No. 91-1496-CFX
Status: GRANTED

Title: Peter C. Reiter, et al., Petitioners
v.
Langdon M. Cooper, etc., et al.

Docketed:
February 4, 1992

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Phillips,Carter G.

Counsel for respondent: Cooper,Langdon M., Walker,Robert B., Steinfeld,Joseph L.,Jr.

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Entry	Date	Note	Proceedings and Orders
1	Feb 4 1992	G	Petition for writ of certiorari filed.
3	Apr 15 1992		Brief of respondents Cooper, Langdon, et al. in opposition filed.
4	Apr 22 1992		DISTRIBUTED. May 15, 1992
5	May 18 1992		Petition GRANTED.
			**********
7	Jun 18 1992		Order extending time to file brief of petitioner on the merits until July 17, 1992.
8	Jun 26 1992		Record filed.
		*	Original proceedings U.S.Court of Appeals - Fourth Circuit and U.S. District Court - North Carolina (1 Box)
9	Jul 16 1992		Joint appendix filed.
10	Jul 16 1992		Brief of petitioners Peter Reiter, et al. filed.
11	Jul 17 1992		Brief amicus curiae of Interstate Commerce Commission filed.
12	Jul 17 1992		Brief amici curiae of National Industrial Transportation League, et al. filed.
14	Jul 20 1992		Order extending time to file brief of respondent on the merits until September 2, 1992.
15	Jul 30 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Aug 2 1992		Brief amicus curiae of American Freight System, Inc. filed.
16	Aug 31 1992		Brief amicus curiae of Leonard L. Gumport, Trustee filed.
17	Sep 2 1992		Brief amicus curiae of Lloyd T. Whitaker filed.
18	Sep 2 1992		Brief amicus curiae of International Brotherhood of Teamsters filed.
19	Sep 2 1992		Brief of respondents Cooper, Langdon, et al. filed.
22	Oct 2 1992		Rule 29.1 statement filed.
21	Oct 5 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Oct 5 1992		Reply brief of petitioners filed.
24	Oct 13 1992		SET FOR ARGUMENT TUESDAY, DECEMBER 1, 1992. (1ST CASE).
25	Oct 15 1992		CIRCULATED.
26	Dec 1 1992		ARGUED.

No. (1)

91-1496

FILED
FEB 2 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1991

In Re: Carolina Motor Express, Inc., Fed. I.D. No. 56–1299892, Debtor.

PETER C. REITER, PETITIONER,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC.;
MARK & ASSOCIATES OF NORTH CAROLINA, INC., RESPONDENT.

CALIFORNIA CONSOLIDATED ENTERPRISES, INC., PETITIONER,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC.;
MARK & ASSOCIATES OF NORTH CAROLINA, INC., RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

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QUESTIONS PRESENTED FOR REVIEW

The issue which this case raises is whether the filed rate doctrine mandates that a shipper must pay the full tariff rate to an insolvent carrier in a rate undercharge collection before the matter may be referred to the Interstate Commerce Commission for a determination of the reasonableness of those rates.

PARTIES TO THE PROCEEDING BELOW

Appellant in the court below was Langdon M. Cooper, the Trustee for the estate in bankruptcy of Carolina Motor Express, Inc., a motor common carrier regulated under the Interstate Commerce Act.

Appellee in the court below was California Consolidated Enterprises, Inc., a broker of motor carrier transportation licensed by the Interstate Commerce Commission.

Appellee in the court below was Peter C. Reiter, a broker of motor carrier transportation licensed by the Interstate Commerce Commission.

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OPINIONS BELOW

The decision of the Court of Appeals was recommended for publication as In Re Carolina Motor Express, Inc. ____ F.2d ____, 1991 WL 227610 (4th Cir. Nov. 7, 1991).

The District Court decisions were not recommended for full text publication. They were printed as Cooper v. California Consolidated Enterprises, Inc., 1989 Federal Carriers Cases at 83,464 and Cooper v. Peter C. Reiter, 1989 Federal Carriers Cases at 83,465.

The decision of the bankruptcy court was published as Cooper v. California Consolidated Enterprises, 84 Bankr. 979 (Bankr. W.D.N.C. 1988).

DATE OF ENTRY OF JUDGMENT AND GROUNDS FOR THE COURT'S JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(10), Title 28 of the United States Code. The decision of the Court of Appeals was entered on November 7, 1991. No petitions for rehearing were filed.

STATUTES INVOLVED

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. Section 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation

> or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 10762(a)(1) of the Interstate Commerce Act, 49 U.S.C. Section 10762 (a)(1) provides:

> A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may

prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

U.S.C. Section 10701(a) requires that:

> A rate, classification, rule or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.

FEDERAL JURISDICTION

The cause of action arose under Sections 10761(a) and 10762(a)(1) of Title 49, and under the provisions of Title 11 of the United States Code. Jurisdiction of the United States Court of Appeals for the Fourth Circuit was

invoked pursuant to Sections 1291 and 1294(1) of Title 28 of the United States Code.

STATEMENT OF THE CASE

This case raises the issue of whether, prior to paying an undercharge, a shipper may assert a defense of rate unreasonableness against a carrier seeking to collect its tariff rate in a rate undercharge proceeding. In Maislin Industries, Inc. et al v. Primary Steel, Inc., 497 U.S. ____, 110 S.Ct. 2759, 111 L.Ed. 2d 94 (1990), the court permitted a shipper to raise the question of rate reasonableness with the Interstate Commerce Commission. The unreasonableness of the filed rates had previously been recognized by this Court as a defense against a carrier's collection of its filed tariff rate. See United States v. Western Pacific R.

Co., 352 U.S. 59, 75 n.18, 77 S.Ct. 161, 171 n. 18, 1 L.Ed. 2d 126 (1956) and Pennsylvania R. Co. v. United States, 363 U.S. 202, 203, 80 S.Ct. 1131, 1132, 4 L.Ed.2d 1165 (1960).

The Maislin decision did not speak to the question of whether the disputed rates had to be paid first. The Fourth Circuit in this case required that the shipper must first pay the rates and then pursue the issue rate reasonableness in the ICC. This decision is contrary to the decision in several other circuits, but in accord with the decision of the Fifth Circuit.

Petitioner California Consolidated Enterprises, Inc. (hereinafter "CCE") is a broker of motor carrier transportation. It arranges transportation services of motor carriers operating

under the authority of the Interstate Commerce Act for the shipping public. It provides these services pursuant to a permit issued to it by the Interstate Commerce Commission. CCE tendered traffic to Carolina Motor Express for transportation in interstate commerce.

Petitioner Peter Reiter is similarly a broker of motor carrier transportation, licensed by the Interstate Commerce Commission to perform these services. Peter Reiter also tendered traffic to Carolina Motor Express for transportation in interstate commerce.

The bankruptcy proceedings which have lead to this dispute, commenced with the filing of a petition under Chapter 11 by Carolina Motor Express, Inc., a motor common carrier. This was later converted to a petition for relief

under Chapter 7 of the United States Bankruptcy Code. Langdon M. Cooper was appointed Trustee of the estate while the proceedings were still under Chapter 11. As a motor common carrier, Carolina Motor Express had a tariff on file with the Interstate Commerce Commission (hereinafter referred to as "ICC" or "Commission"). The tariff at issue here contained a provision, effective June 16, 1985, which provided that the carrier could collect a late payment charge of 1.25% per month on all freight bills which were not paid within 15 days of the delivery of that shipment. The tariff also contained a provision that the carrier was entitled to collect attorney's fees in an amount computed at 33% of the transportation and late payment charges, if it became necessary for the carrier to turn the account over to an attorney for collection.

Plaintiff, Mark & Associates, is a rate auditing company hired by the estate, pursuant to Court order, to audit the carrier's freight bills. Plaintiff, Mark, audited the freight bills for shipments transported for petitioners, inter alia. The audit for CCE's shipments revealed freight undercharges in the amount of $58,793.03. The audit for Peter Reiter revealed freight undercharges in the amount of $13,795.73. Debtor and Mark Associates brought these actions to collect these amounts.

ARGUMENT

REASONS WHY THIS WRIT SHOULD BE GRANTED

A. Allowing the Decision of the Fourth Circuit to Stand Creates a Conflict between the Rule Adopted by It and the Decisions of other Courts of Appeal following the Decision of this Court in Maislin

In its Supplemental Brief for the

Federal Respondents in Opposition, concerning the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in Rebel Motor Freight, Inc. v. Interstate Commerce Commission (infra) (October Term, 1991) (cert. denied), the Solicitor General summed up the positions of the Courts of Appeal which have addressed this issue.

> With the decision in Carolina Motor Express, there is now a conflict in the circuits that is unlikely to be resolved by further litigation in the lower courts. The First Circuit has held that referral to the ICC of a rate-unreasonableness defense is appropriate. Delta Traffic Serv., Inc. v. Transtop, Inc., 902 F.2d 101 (1990). The Fourth Circuit's decision in Carolina Motor Express is to the contrary. The Fifth Circuit, in dicta, has taken the same position as the Fourth Circuit. In re Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S.Ct. 3254 (1990). While the issue presented in this case is now squarely before the Fifth Circuit In Advance-United Expressways, Inc. v. Eastman Kodak Co., No. CA 3-89-2025-G (N.D. Tex. Nov. 30, 1990; Dec. 13, 1990; March 12, 1991) appeal pending, No. 91-1320, and the ICC will urge that court to permit referral, even if the Fifth Circuit were to agree with the Commission and to allow referral of rate-unreasonableness claims, the conflict between the First and Fourth Circuits would persist.
>
> 3. In an appropriate case, we believe that this conflict should be resolved by this Court. This case however, does not present a proper vehicle for resolution of the issue. (p.3, Supplemental Brief, pages 1-6, attached as Appendix "A").

To expand on the Solicitor General's presentation, the First Circuit, in Delta Traffic Serv., Inc. v. Transtop, Inc., 902 F.2d 101, prior to the decision of this Court in Maislin, had found for the shipper on both the defenses of unreasonable rates and unreasonable practices. After the entry of the Maislin Decision, that court amended its decision to reverse the initial decision on the unreasonable

practices. Relying on the specific language in Maislin, cited above, the First Circuit upheld the decision as to the reasonableness of the rates defense. (Slip Opinion, Appendix "B")

The Second Circuit also allowed a shipper to raise the unreasonableness of the rates sought to be collected as a defense. See Duffy v. BMC Industries, Inc., 938 F.2d 353, 357 (2d Cir. 1991).

The Sixth Circuit in Rebel Motor Freight, Inc. v. I.C.C., U.S.A. and Sunshine Mills, 933 F.2d 1009 (6th Cir. 1991), cert. den. ____U.S.____, Dec. 2, 1991 and Orr v. I.C.C., 912 F.2d 119 (6th Cir., 1990) did not require the shipper to pay the full rates prior to a determination by the ICC as to the reasonableness of the rates, but the issue presented there was complicated

by a statute of limitations issue as explained in the Solicitor General's Supplemental Brief.

In Western Transportation Co. v. Wilson & Co., 682 F.2d 1227 (7th Cir., 1982)(a pre-Maislin case) the Seventh Circuit allowed the shipper to pursue its rate unreasonableness argument before the ICC without first requiring the shipper to pay the tariff rate.

The Eighth Circuit has not spoken directly to this issue. However, on remand of the Maislin case, the district court did not require the payment of the tariff rate. Maislin Industries v. Primary Steel, 1991 WL 264536, *2 (W.D. Mo., Nov. 21, 1990).

In contrast to those decisions, the Fifth Circuit, in an unpublished decision, Advance-United Expressways,

Inc. v. Duro Metal Mfg. Co., No. 90-7086 (5th Cir. Aug. 23, 1991)(per curiam) followed the precedent set in Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d 388, 389 (1989)(a pre-Maislin decision). In that case, the Fifth Circuit found that the defense of unreasonable rates did not protect the shipper from having first to pay the filed rate and then file for reparations. That is the path the Fourth Circuit chose to follow in the instant case.

The Third Circuit has not directly addressed this issue. In Branch Motor Express Co. v. Caloric Corp., No. 89-1131 (3rd Cir., Aug. 14, 1990) that court would not allow the shipper to raise the issue of the unreasonableness of the carrier's rates as the shipper had not presented any evidence to the

court as to the unreasonableness of those rates.

B. This clear split between the Circuits must be resolved because of its importance to the Interstate Commerce Commission (Commission) in its administration of the Act.

Therefore, there is a clear split between the Circuits on this issue. Because of its importance to shippers and in the administration of the Interstate Commerce Act, the Solicitor General has indicated that this issue should be resolved by this Court in an appropriate case (Rebel Brief, supra). We submit that this is an appropriate case. Moreover, the urgency of obtaining a resolution of these issues is increasing as carriers seek to disavow their own previously filed discount rates as unlawful without referral to the Commission. The

Commission has estimated that this new development could increase the maximum potential exposure of shippers for undercharge claims from the up to $1 billion associated with the negotiated but unfiled rates addressed by this Court in Maislin to $27 billion. (Traffic World, "ICC makes 'conservative' estimate of undercharges - over $27 billion" December 16, 1991, p. 31; Traffic World, "The Week", December 2, 1991).

C. The Ruling Below Conflicts with Decisions of this Court.

In Maislin, supra, this Court unequivocally stated that the shipper in a negotiated rates case was entitled to explore the reasonableness of the rates sought to be collected, Maislin, supra 110 S.Ct. at 2767. This followed an earlier line of cases in which this

Court had allowed the shipper to assert the unreasonableness of the filed rates as a defense against the collection of that rate. See United States v. Western Pacific R. Co., 352 U.S. 59, 75 n. 18, 77 S.Ct. 161, 171 n. 18, 1 L.Ed. 2d 126 (1956) and Pennsylvania R. Co. v. United States, 363 U.S. 202, 203, 80 S.Ct. 1131, 1132, 4 L.Ed.2d 126 (1956). A necessary corollary to that right is that, if the rates were found to be unreasonable, that finding would operate as a defense to the payment of the charges. If this were not a corollary, the reasonableness of the rates would be a non-issue, because the shipper would be required to pay the tariff rate, whether it was reasonable or not. As the carrier, in that case as well as in the instant proceeding, was in bankruptcy, a finding that the rate was unreasonable would only be of any

effect if the shipper could assert it prior to paying the full tariff rate to the estate. As an unsecured creditor, the shipper could not reasonably expect any meaningful return from the estate in bankruptcy if the rate collected were subsequently determined to be unreasonable.

The Fourth Circuit has overlooked a significant condition for prepayment set forth in the Fifth Circuit's decision in Southern Pacific Transportation Co. v. City of San Antonio, 748 F.2d 266 (5th Cir. 1984), the cornerstone of Supreme Beef Processors v. Yaquinto (In re Caravan Refrigerated Cargo), 864 F.2d 388 (5th Cir. 1989), cert. den. 110 S.Ct. 3254 (1990). In City of San Antonio, the court held that the "carrier must be prepared to reimburse amounts later

found to be unreasonable." Id., at 274. As a result, we believe it is clear that the effectiveness of a subsequent reparations remedy is a pre-condition to requiring prepayment. Requiring a shipper to pay the amounts claimed to be due to a defunct carrier where there is little prospect that a subsequent order of reparations will provide any effective remedy because the auditor/collection agency retains approximately 70% of the amount collected off the top and the remaining 30% will be dissipated before a subsequent order becomes effective clearly produces a result proscribed by this Court's decisions in Western Pacific, supra, and General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940).

CONCLUSION

This Court in Maislin has reaffirmed the obligation of carriers to charge and shippers to pay the filed tariff rate. This Court also reaffirmed the requirement set forth in 49 U.S.C. Section 10701(a) and in United States v. Western Pacific R. Co., supra, that the rates must be reasonable, and that, if the rates are not reasonable that that unreasonableness would constitute a defense to the payment of the excessive rate. Because of the split which has come into existence between the Circuits on the issue of whether the shipper must pay the full tariff rate to an insolvent carrier prior to referral to the Commission, and the importance of a resolution of the issue to the Commission in its administration of the Interstate Commerce Act and the public interest, it has become

necessary for this Court to resolve this issue.

Petitioners, therefore, request this Court to grant this Petition for a Writ for Certiorari and that same be issued to the United States Court of Appeals for the Fourth Circuit to the end that its decision be reversed and held null, and that the court below be instructed to refer the question of the rates sought to be collected to the Interstate Commerce Commission, prior to payment being required.

Respectfully submitted,

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Petitioners

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 89-3259, 89-3261, 89-3262

IN RE: CAROLINA MOTOR EXPRESS, INC., DEBTOR

LANGDON M. COOPER, Trustee; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

DELAWARE VALLEY SHIPPERS, DEFENDANT-APPELLEE

LANGDON M. COOPER, Trustee for Carolina Motor Express, Inc.; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

PETER C. REITER, DEFENDANT-APPELLEE

LANGDON M. COOPER, Trustee for Carolina Motor Express, Inc.; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

CALIFORNIA CONSOLIDATED ENTERPRISES, INC., DEFENDANT-APPELLEE

Appeals from the United States District Court
for the Western District of North Carolina, at Shelby
Woodrow Wilson Jones, Senior District Judge
CA-88-147-SH-C, CA-88-138-SH-C, CA-88-139-SH-C

December 7, 1989, Argued

November 7, 1991, Decided

Before WIDENER and HALL, Circuit Judges, and MICHAEL, District Judge*

WIDENER, J.

In this consolidated appeal, we address issues arising from the requirement of the Interstate Commerce Act (Act), 49 U.S.C. § 10101 et seq. (1982) that motor common carriers file their rates with the Interstate Commerce Commission (ICC) and that both shippers and carriers adhere to these rates. These cases involve a motor carrier that seeks to collect, based upon its tariff on file with the ICC, undercharges from a shipper with whom it privately negotiated a rate lower than that which the tariff required.

The bankruptcy court entered a final judgment for the plaintiffs in two of the three cases, concluding that because the filed rate doctrine precluded defendants' assertion of equitable defenses to the carrier's undercharge claims, the carrier was entitled to recover regardless of its own actions. Cooper v. California Consolidated Enterprises, 84 Bankr. 979 (Bankr. W.D.N.C. 1988). On appeal, the district

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* United States District Judge for the Western District of Virginia, sitting by designation.

court reversed the final judgments of the bankruptcy court and referred to the ICC the question of whether the carrier's collection of the undercharges would amount to an unreasonable practice. Although the ICC has yet to issue a decision in the two cases, plaintiffs now appeal.[1]

On recommendation of the bankruptcy court, the district court withdrew reference to the bankruptcy court of the third case and, on the defendant's motion, referred the case to the ICC. The ICC later issued a decision in the case stating that the carrier's collection of undercharges constituted an unreasonable practice. Based upon the ICC's finding, the district court granted summary judgment for defendant and dismissed plaintiffs' action. Plaintiffs appeal.[2]

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[1] In their brief, defendants Reiter and California Consolidated Enterprises question the propriety of this court's jurisdiction by characterizing plaintiffs' appeal as the impermissible appeal of the district court's interlocutory order of referral to the ICC. Although this issue is not worthy of extensive discussion, we note that a significant difference exists between our more usual review of a district court sitting in judgment as a trial court and our review of a district court acting as an appellate tribunal in bankruptcy. This distinction has caused many circuit courts to adopt more relaxed definitions of a final district court order in bankruptcy if, as is the case here, a bankruptcy court already has entered a final order. See, e.g., Sambo's Restaurants, Inc. v. Wheeler, 754 F.2d 811, 813-15 (9th Cir. 1985); In re Marin Motor Oil, Inc., 689 F.2d 445, 449 (3d Cir. 1982), cert. denied, 459 U.S. 1206 (1983).

[2] Defendant Delaware Valley Shippers also advances a jurisdictional argument. Delaware Valley contends that plaintiffs' appeal as to it should be dismissed because plaintiffs failed to seek review of the ICC's decision within the ninety-day period specified in 28 U.S.C. § 1336(c). The short answer to the argument is that plaintiff did not appeal from the ICC's decision, but from the district court's entry of summary judgment.

We vacate the district court's reversal of the bankruptcy court's judgment in the first two cases, and vacate the district court's entry of summary judgment for defendant in the third case. For the reasons discussed below, we remand these cases to the district court with instructions that the judgment of the bankruptcy court be reinstated in 89-3261 and 89-3262, that the plaintiffs' cross-appeal from the judgment of the bankruptcy court concerning late payment charges and attorneys' fees be ruled upon in 89-3261 and 89-3262, and that judgment be entered in favor of the plaintiffs in 89-3259.

I.

Because the material facts in all three cases are undisputed and are for all practical purposes identical, we need not set forth a detailed chronology of the relationship between the parties. The Fifth Circuit aptly described the present scenario as follows:

> The well-worn choreography for these cases involves a motor carrier's action against a shipper to collect for under-charges; that is, to collect the difference between the higher rate which the carrier has filed with the Interstate Commerce Commission . . . and the rate which the parties had negotiated.

Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d 388, 388-89 (5th Cir. 1989), cert. denied, 58 U.S.L.W. 3818 (1990). As was the case in Supreme Beef, the motor carrier in this case, Carolina Motor Express (CMX), supplied transportation services to the shippers at privately negotiated rates. The shippers believed that CMX would publish the quoted rates in its tariff on file with the ICC. CMX however, did not publish the quoted rates as a tariff

and later billed the shippers at the negotiated rate, which the shippers paid in full. After CMX became bankrupt, an independent auditor employed by the bankruptcy trustee discovered the discrepancy between the collected rates and the applicable tariff rates. The trustee and auditor then filed suit to recover the difference on behalf of CMX as debtor.

II.

Under 49 U.S.C. § 10761(a), a motor carrier subject to the Interstate Commerce Act "may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff" filed with the ICC. In addition, the Act states that "[a] rate . . . , classification, rule, or practice related to transportation or service provided by a carrier . . . must be reasonable." 49 U.S.C. § 10701(a). In the classic case of Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915), the Court explained the significance of section 10761(a)'s predecessor which is the same for the present statute:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

The Court recently reemphasized the importance of this filed rate doctrine as "essential to preventing price discrimination and stabilizing rates." Maislin Industries, U.S., Inc v. Primary Steel, 58 U.S.L.W.

4862, 4864 (1990). The defendants, prior to our order holding this appeal in abeyance pending the Supreme Court's Maislin decision, contended that the carrier's attempt to collect the undercharges was an unreasonable practice under the Act and that the plaintiffs were therefore not entitled to collect the filed rate. Maislin rejected just this contention as do we. As the Supreme Court observed, allowing such an equitable defense would be "flatly inconsistent" with the statute because the defense "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular." Maislin, 58 U.S.L.W. at 4865-66. We accordingly vacate the district court's reversal of the bankruptcy court's judgment in 89-3261 and 89-3262, and vacate the district court's entry of summary judgment for defendant in 89-3259.

The defendants next argue that, Maislin notwithstanding, this court should remand these cases back to the district court with instructions to refer them to the ICC for a determination of the reasonableness of the carrier's filed tariff rates. In fact, the defendants argue that certain passages in the Maislin opinion require such an course. Before we consider this argument, however, we must first address the plaintiffs' assertion that the defendants have waived any claim they may have had by failing to raise the issue of rate reasonableness in prior proceedings. After a review of the record in these cases, we find that the defendants have preserved the argument.

Having determined that the defendants may contest the reasonableness of the carrier's filed rates, the question remains of whether the cases should be remanded for re-referral to the ICC. This question

is one that the Supreme Court has not decided and on which there is no precedent in this circuit. Maislin, to be sure, did mention in a footnote that the issue of rate reasonableness was not presented in the case and would be "open for exploration" on remand. 58 U.S.L.W. at 4865 n.10. But while the Supreme Court has noted without disapproval a stay of proceedings and referral to the ICC after reasonableness was raised as a defense, see Maislin, 58 U.S.L.W. at 4864; United States v. Western Pac. R.R. Co., 352 U.S. 59, 71 (1956), it has also reiterated in Maislin that "under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation." 58 U.S.L.W. at 4865 (quoting Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R.R. Co., 284 U.S. 370, 384-85 (1932); see also Pennsylvania R.R. Co. v. International Coal Mining, 230 U.S. 184, 197 (1913) ("If . . . the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation."). We believe that the Court's decisions are correctly read as taking no position on whether re-referral to the ICC is required in such cases.

We are of opinion that a defense attacking the reasonableness of a carrier's filed rates should not operate to stay enforcement of the filed rate doctrine. Rather, shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier. We believe that such an approach is preferable to an alternative procedure under which the courts would automatically refer cases to the ICC whenever a rate was challenged. This alternative approach would provide a strong incentive for shippers routinely to con-

test the validity of the carriers' rates in order to delay paying the carrier's filed rate. Such a situation would be wholly inconsistent with the filed rate doctrine. Shippers are charged with knowledge of the filed rate, Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. at 97; Kansas City Southern R.R. Co. v. Carl, 227 U.S. 639, 653 (1913), and can contest its reasonableness directly before the ICC at any time, see 49 U.S.C. § 10708(a)(1); Regular Common Carrier Conference v. United States, 793 F.2d 376, 379 (D.C. Cir. 1986). Moreover, carriers are entitled to receive the filed rate for their services immediately when due. Arizona Grocery v. Atchison, Topeka & Santa Fe R.R. Co., 284 U.S. at 384; Southern Pac. Transp. Co. v. San Antonio, Texas, 748 F.2d 266, 274 (5th Cir. 1984). Given these basic precepts, we believe that it would be anomalous to allow the defendants a further delay in paying the rates, of which they have been charged with knowledge from the beginning, but which they did not contest until they were sued by the trustee.

In adopting this position, we join the Fifth Circuit, which has determined that "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission." Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d at 392; see also Southern Pacific Transp. Co. v. San Antonio, Texas, 748 F.2d at 274. We note that such a rule in no way forecloses the shipper from raising the issue of the reasonableness of the tariff rates. This issue could be raised either before or after the filing of the undercharge suit and could result in a reparations payment to the shipper by the carrier. See 49 U.S.C. § 10708(a)(1); Regular Common Carrier Conference, 793 F.2d at

379. In the meantime, however, the tariff rate as filed will have been enforced. While we recognize that judicial opinion on this point is not unanimous, Delta Traffic Serv., Inc. v. Transtop, Inc., 902 F.2d 101 (1st Cir. 1990); see also Western Transp. Co. v. Wilson & Co., 682 F.2d 1227 (7th Cir. 1982), we believe that the rule we adopt today best accords with the Supreme Court's longstanding insistence that "strict adherence to the filed rate . . . , despite its harsh consequences in some cases, is necessary to enforcement of the Act." Maislin, 58 U.S.L.W. at 4866; see Southern Pac. Co. v. Commercial Metals, 456 U.S. 336, 343-44 (1982); Midstate Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356, 361 (1943). And we add that we consider it of considerable importance that the filed rate doctrine has resulted in the prevention of the secret and discriminatory negotiated freight rates which were the plague of common carriers in times past.

On remand, the district court is instructed to reinstate the judgment of the bankruptcy court in 89-3261 and 89-3262, and to enter judgment for the plaintiffs in 89-3259. In addition, the district court in 89-3261 and 89-3262 should rule upon the plaintiffs' claim that the bankruptcy court erred in denying the late payment charges and attorneys' fees provided for in ICC CAXN 101 Item 435 of the carrier's tariff.[3]

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[3] If the district court finds that the language of this tariff provision applies to any of the charges at issue in these cases, the parties are bound by the tariff's terms. An unambiguous and duly published tariff is "binding on the parties and has the force of law . . . . regardless of the intentions of the parties or the equities existing between carrier and shipper." Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1372 (9th Cir. 1985); see also National Van Lines, Inc. v. United States, 355 F.2d 326, 331 (7th Cir. 1966).

Accordingly, the judgments of the district court reversing the bankruptcy court in 89-3261 and 89-3262 are

VACATED AND REMANDED WITH INSTRUCTIONS.

The district court's entry of summary judgment in 89-3259 is also

VACATED AND REMANDED WITH INSTRUCTIONS.[4]

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[4] The dissent argues that when, as in this case, the carrier is in bankruptcy, our decision today "may well leave the complaining shipper without a remedy" because "an independent reparations action might conclude after the termination of the bankruptcy proceedings, leaving a shipper with an ICC determination of unreasonableness that is unenforceable because the assets of the debtor's estate had been distributed earlier." Dissent, p. [15a], n.3. We disagree. Under the Bankruptcy Code as it now stands, the shipper who is required by our ruling today to pay the full tariff rate, and who then argues that this rate is unreasonably high, would stand in the same position as a shipper who had complied with the law by paying the full tariff rate in the first instance. The Bankruptcy Code defines a claim to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed [or] undisputed." 11 U.S.C. § 101(5)(A). "By this broadest possible definition . . . [the Code] contemplates that all legal obligations of the debtor, no matter how remote or contingent will be able to be dealt with in the bankruptcy case." H. Rep. No. 595, 95th Cong. 1st Sess. 309 (1977), S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787. The right to reparation for payments under an unreasonably high tariff rate, see 49 U.S.C. §§ 11705(b)(3), 10701(a), would constitute a pre-petition contingent, unliquidated, and disputed claim against the bankruptcy estate. See Grady v. A.H. Robins Co., Inc., 839 F.2d 198 (4th Cir. 1988), cert. dismissed, 109 S.Ct. 201, 101 L.Ed.2d 972. As a general unsecured creditor, the complaining shipper would have the right to be paid a pro rata share of his claim along with the carrier's other unsecured creditors. 11 U.S.C. § 726(a)(2), (b). If waiting for an ICC determination of unreasonableness would "unduly delay" distribution of the bankruptcy estate, the value of the shipper's reparations claim would be estimated in the bankruptcy proceeding. 11 U.S.C. § 502(c)(1) ("There shall be estimated for purpose of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.") In sum, the dissent's concern for the shipper who must deal with a bankrupt carrier is unfounded. The Bankruptcy Code provides adequate relief.

In the response to this note, at note 3, the dissent asserts that "there is no question" that in "an undercharge action by a non-bankrupt carrier" the shipper would be entitled to assert an unreasonable rate defense. Therefore, it argues, the shipper also should be allowed to assert the defense when the claim is brought by the trustee for a bankrupt carrier. Contrary to this assertion, however, there not only is a question whether a shipper can assert the unreasonable rate defense in an undercharge action by a non-bankrupt carrier, this is the very question that we address in our opinion today. To reiterate: "We are of opinion that a defense attacking the reasonableness of a carrier's filed rates should not operate to stay enforcement of the filed rate doctrine. Rather, shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier." Majority opinion at [7a]. It is apparent, once we get beneath the bankruptcy veneer, that the dissent simply disagrees with the majority holding in this case.

HALL, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's application of Maislin to the cases before us to the extent that the shippers' defense of "unreasonable practice" is disallowed as violative of the filed-rate doctrine. I disagree, how-

ever, with the majority's holding that a shipper may not raise "unreasonable rate" as a defense in an undercharge action. Furthermore, I believe that the equitable defense of unreasonable rate implicates a matter within the primary jurisdiction of ICC, and, therefore, referral to that agency and a stay of the court proceedings is the proper course of action.

Maislin involved a fact pattern similar to the instant cases. A carrier filed for bankruptcy, an audit revealed that several shippers had paid negotiated rates rather than the filed rate, an undercharge action was instituted, and the defendant shippers raised both unreasonable-rate and unreasonable-practice defenses. The primary thrust of the Supreme Court's decision is to invalidate ICC's 1986 Negotiated Rates policy and thereby affirm the continued validity of the filed-rate doctrine. The Court noted, however, that the "filed rate is not enforceable if ICC finds the rate to be unreasonable." *Id.*, 110 S. Ct. at 2767. Although both the reasonableness of the rates and the practice of charging a negotiated rate were referred to ICC by the district court in Maislin, only the unreasonable practice issue was addressed by the agency. Maislin Industries, U.S. v. Primary Steel, 705 F. Supp. 1401, 1402-03 (W.D. Mo. 1988). The Supreme Court noted, without elaboration, that "the issue of the reasonableness of the tariff rates is open for exploration on remand." Maislin, 110 S. Ct. at 2767 n.10. This somewhat cryptic footnote "has created uncertainty as to whether, in a carrier's suit to collect undercharges, a shipper may assert as a defense that the applicable tariff rate is unreasonable and obtain a stay of the suit and a reference to ICC for a determination of whether the rate is unreasonable." Duffy v. BMC Industries,

Inc., 938 F.2d 353, 355 (2nd Cir. 1991). This uncertainty leads the majority to a decision that I believe is at odds with precedent and sound practice.[1]

The majority finds, and I agree, that the three appellant-shippers have preserved the issue of rate reasonableness. The question remaining after Maislin is whether the shippers should be allowed to dispute the reasonableness of the rates in the context of the undercharge action, or whether their sole recourse should be an independent reparations[2] action under 49 U.S.C. § 11705(b)(3). For a variety of reasons, I believe the former path is correct.

I believe the sounder position is set forth in Delta Traffic Service v. Transtop, Inc., 902 F.2d 101, 104-07 (1st Cir. 1990). In addition to demolishing the legal basis for the non-referral rule adopted by the Fifth Circuit in Supreme Beef Processors, the First Circuit explains the historical basis for the referral and stay rule which it believed was "universally accepted" until Supreme Beef Processors was discovered. Id. at 105. To the First Circuit's analysis I can only add the names of other post-Maislin decisions that have followed the referral and stay rule. Duffy v. BMC Industries, 938 F.2d 353 (2nd Cir. 1991); Horn's Motor Express v. Harrisburg Paper Co., 765 F. Supp. 211 (M.D. Pa. 1991); Overland Express v. International Multifoods, 765 F. Supp. 1386 (S.D. Ind. 1990); Oneida Motor Freight v. Ormond Shops, 126 Bankr. 431 (D.N.J. 1991); In re

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[1] Upon remand, the district court in Maislin did stay proceedings and referred the rate issue to the ICC. Maislin Industries, U.S. v. Primary Steel, 1990 WL 264536 (W.D. Mo. Nov. 21, 1990) (unpublished).

[2] The term "reparations" was changed to "damages" in 1978. Pub. L. 95-473, 92 Stat. 1451 (1978).

Sharm Express, Inc., 122 Bankr. 999 (D. Minn. 1991).

One of the majority's arguments against referral and stay is that such a procedure "would provide a strong incentive for shippers routinely to contest the validity of the carrier's rates in order to delay paying the carrier's filed rate." Slip op. at 7[a]. This argument ignores the disincentives against the filing of frivolous pleadings, e.g., Fed. R. Civ. P. 11, as well as other provisions to discourage delaying tactics. See, e.g., 49 U.S.C. 11705(d)(3) (allowing an award of attorney's fees to a prevailing party in an action to enforce an ICC order for damages). Moreover, a complaining shipper should be required to present a threshold level of evidence of unreasonableness before referral is warranted; "a bold, conclusory allegation of rate unreasonableness" is insufficient. Oneida Motor Freight, 126 Bankr. at 442; see also In re Sharm Express, 122 Bankr. at 1004-05 (fifty percent disparity between rates of the carrier claiming undercharges and other ICC carriers sufficient to warrant referral); Covey v. Conagra, 763 F. Supp. 479, 482 (D. Colo. 1991) (party requesting reference must "make a threshold showing of unreasonableness . . . ."). This threshold determination would act as a further check against the referral of non-meritorious claims of rate unreasonableness.

These undercharge cases often arise in bankruptcy proceedings. Allowing the bankruptcy to proceed unabated, despite a claim of rate unreasonableness, may well leave the complaining shipper without a remedy. An independent reparations action might conclude after the termination of the bankruptcy proceedings, leaving a shipper with an ICC determination of unreasonableness that is unenforceable because the assets of the debtor's estate had been distributed earlier.[3]

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[3] The majority establishes the following procedure for cases of this kind: (1) the shipper first pays to the bankruptcy trustee the difference between the negotiated rates paid and the filed rate; (2) the shipper's assertion of an unreasonable rate is treated as an unsecured claim against the bankruptcy estate; (3) the bankruptcy court estimates the value of this claim by determining the reasonable rate; and (4) the shipper receives, along with other unsecured creditors, a pro rata share of his claim. Slip op. at 9, n.4. Presumably, the independent reparations action before the ICC continues apace. See Slip op. at 7. Should the ICC eventually determine that the filed rate was not reasonable (and, therefore "not enforceable," Maislin, 110 S. Ct., at 2767), it is not clear what the shipper's remedy is at that point. Even if the bankruptcy action is still pending, the only effect would be to substitute the ICC's determination for the bankruptcy court's estimate of the claim's value.

I believe this stands the matter on its head. It is the bankruptcy trustee who is making a claim against the shipper; the shipper, in turn, has asserted the defense of "unreasonable rate." If the shipper is correct, the filed rate is "not enforceable," id., and the trustee should receive nothing more than the unpaid portion of the reasonable rate. The majority, however, would give automatic judgment to the trustee and make the shipper pay a possibly unreasonable, unlawful and unenforceable rate. After this rate is paid, the shipper is left with a claim against the estate; even if the court estimates the value of this claim as the full difference between the negotiated rate and the filed rate, the shipper can only receive a pro rata share with the other unsecured creditors, an amount likely to be substantially less than the "claim" itself.

As the majority correctly notes, this procedure puts these shippers in the same position as those that had paid the filed rate initially. The majority ignores the fact that in the cases involving negotiated rates, the shippers are asserting a defense. See Delta Traffic Service, Inc. v. Transtop, Inc., 902 F.2d 101, 104 (1st Cir. 1990) ("Because shippers may assert the unreasonableness of a rate as grounds for recovery in a

I would reverse in 89-3259 and affirm the district court's order in 89-3261 and 89-3262 to the extent the bankruptcy court's orders in these cases were reversed, and I would remand with instructions to refer the rate unreasonableness issue to ICC and to stay other proceedings pending ICC's determination. I would, however, condition the referral upon a showing by each shipper that its rate claim was more than a "bold, conclusory allegation of rate unreasonableness." Oneida Motor Freight, 126 Bankr., at 442.

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reparations suit, courts ordinarily have permitted shippers to assert this same ground as a defense in a carrier's suit to collect the filed ('legal') rate.") (citing United States v. Western Pac. R.R. Co., 352 U.S. 59 (1956), and other cases). In an undercharge action by a non-bankrupt carrier, there is no question that the shipper would be entitled to assert this defense. In an undercharge action brought as an adversary proceeding by a bankruptcy trustee, I see no reason why the defense should be disallowed. See Bankruptcy Rule 7008. That this places the negotiated-rate shippers in a somewhat better position than the filed-rate payors is not a basis for eliminating the defense of rate unreasonableness. See Delta Traffic Service, Inc. v. Georgia-Pacific Corp., 936 F.2d 64 (2nd Cir. 1991) (ordering district court to separately maintain the amount paid by the shipper as the difference between the negotiated and filed rates until rate reasonableness issue resolved by ICC).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-329

REBEL MOTOR FREIGHT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This supplemental brief is filed pursuant to Rule 15.7 of the Rules of this Court to call attention to a recent decision of the United States Court of Appeals for the Fourth Circuit in *In re Carolina Motor Express, Inc.*, Nos. 89-3259 89-3261, 89-3262 (Nov. 7, 1991).[1]

1. The principal issue in this case is whether, under the filed rate doctrine, when an insolvent motor carrier sues to collect undercharges based on the tariff rate, the shipper must pay the tariff rate prior to a determination by the Interstate Commerce Commission (ICC) of the reasonableness of that rate. The court of appeals in this case correctly held that

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[1] The opinion of the court of appeals in *Carolina Motor Express* is reproduced in an appendix to this brief. App., *infra*, 1a-16a.

the shipper's unreasonable-rate defense should be referred to the ICC.

In *In re Carolina Motor Express, Inc., supra*, a divided panel of the Fourth Circuit reached the opposite conclusion, holding that referral is not permitted. There, a motor carrier had provided transportation to shippers at unfiled, negotiated rates. After the carrier's bankruptcy, an auditor discovered that the applicable tariff rates were higher than the negotiated rates. The trustee and the auditor then sued the shippers to recover the difference. App., *infra*, 4a-5a. The court of appeals held that the shippers' defense that the tariff rates were unreasonable did not justify a stay of enforcement pending referral to the ICC. *Id.* at 7a. The majority reasoned that such a procedure would be "wholly inconsistent with the filed rate doctrine," which requires that "shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier." *Ibid.* Judge Hall dissented from that ruling. *Id.* at 11a-16a. He would have held that the shipper's defense that the rate is unreasonable "implicates a matter within the primary jurisdiction of [the] ICC, and, therefore, referral to that agency and a stay of the court proceedings is the proper course of action." *Id.* at 12a.

2. In our brief in opposition, we noted that, although the courts of appeals had reached different conclusions as to the appropriateness of referring claims of unreasonableness to the ICC, there was no conflict between published decisions of the courts of appeals that had squarely addressed this issue. Accordingly, we suggested that this Court's intervention was not currently required. Br. in Opp. 13-14.

With the decision in *Carolina Motor Express*, there is now a conflict in the circuits that is unlikely to be

resolved by further litigation in the lower courts. The First Circuit has held that referral to the ICC of a rate-unreasonableness defense is appropriate. *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101 (1990). The Fourth Circuit's decision in *Carolina Motor Express* is to the contrary. The Fifth Circuit, in dicta, has taken the same position as the Fourth Circuit. *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S. Ct. 3254 (1990). While the issue presented in this case is now squarely before the Fifth Circuit in *Advance-United Expressways, Inc.* v. *Eastman Kodak Co.*, No. CA 3-89-2025-G (N.D. Tex. Nov. 30, 1990; Dec. 13, 1990; Mar. 12, 1991), appeal pending, No. 91-1320, and the ICC will urge that court to permit referral, even if the Fifth Circuit were to agree with the Commission and to allow referral of rate-unreasonableness claims, the conflict between the First and the Fourth Circuits would persist.

3. In an appropriate case, we believe that this conflict should be resolved by this Court. This case, however, does not present a proper vehicle for resolution of the issue.

As this Court is aware, see *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), in recent years a significant number of motor carriers have become insolvent and have sought to collect undercharges from shippers who had relied on negotiated, unfiled rates. The total amount at stake in those cases has not been determined, but "[i]t now is estimated that freight undercharges are approaching $1 billion in liability."[3] "[M]any ship-

[3] J. Schulz, "Charging Discount 'Schemes' Illegal, Transcon Seeks Huge Shipper Refunds," *Traffic World* 15 (Nov. 11, 1991). On September 19, 1991, the Chairman of the ICC advised the Senate Committee on Commerce, Science, and Transportation that published estimates of undercharge liability

pers have challenged the reasonableness of the rate sought by bankrupt motor carriers and their collection agents in undercharge actions." *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 62 (1991). The Commission has advised us that, at present, nearly 200 rate-unreasonableness cases are pending before it related to undercharge claims and that those cases involve an estimated $10 million. The current controversy over the meaning of the filed rate doctrine, therefore, has significant financial implications for the shipper community and motor carrier industry.[3]

The issue is also important to the ICC's administration of the Interstate Commerce Act. In the wake of this Court's decision in *Maislin*, courts have experienced difficulty in reconciling the filed rate doctrine with the demands of the primary jurisdiction doctrine. Where courts have refused to refer rate-unreasonableness claims to the ICC, the ICC's pri-

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range from $200 million to as much as $1 billion. The ICC is aware of at least 186 motor carriers that have filed claims against shippers based on the existence of higher tariff rates than the rates that were negotiated.

[3] To be sure, it is uncertain whether shippers and carriers will continue to face this problem with respect to future shipments. As this Court noted in *Maislin*, "[o]ne would think that a shipper who has the market power to require a carrier to reduce his tariffs could also require proof from a carrier that the negotiated rate had been filed before tendering the shipment, especially since there are commercial services providing up-to-the-minute details of the carrier's rate schedule." 110 S. Ct. at 2769 n.12. With proof of the filed rate in hand, the shipper could presumably avoid the situation where a bankrupt carrier, years after the shipment, would assert the right to collect a higher-than-agreed-upon filed rate, which the shipper believes is unreasonable. Nevertheless, the existing backlog of cases is of a sufficient magnitude to cause concern to the transportation industry.

mary jurisdiction to enforce the Act is undermined, and shippers are deprived of an adequate remedy. The confusion over proper application of the primary jurisdiction doctrine will continue absent clarification by this Court.[4]

Nevertheless, we do not believe that this case is an appropriate vehicle for review of this issue. The judgment in this case is supported by a ground on which there is no conflict in the circuits and which does not warrant this Court's review: referral to the ICC is permitted here because petitioner did not commence its undercharge action until after the statute of limitations had run on the shipper's right to seek reparations. As we explain in our brief in opposition (at 11-12), it is settled law that referral to the ICC is authorized in that setting under this Court's decision in *United States* v. *Western Pac. R.R.*, 352 U.S. 59 (1956). The Second Circuit so held in *Duffy* v. *BMC Indus., Inc.*, 938 F.2d 353, 357 (1991), and no court of appeals has disagreed.

The existence of this narrower ground for decision obviates the need for reaching the broader question raised by the petition in this case. Cf. *Duffy*, 938 F.2d at 358 ("It will be time enough to revisit the issue [of whether a rate-unreasonableness claim should, in general, be referred to the ICC] * * * when a shipper who has not paid asserts an unreas-

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[4] The confusion may also spread to other issues. For example, the ICC advises us that some trustees of bankrupt carriers are now claiming that their own filed discount tariffs are unlawful and that they are therefore entitled to collect higher rates based on their non-discount tariffs. These trustees are also claiming, in reliance on the filed rate doctrine and *Maislin*, that courts are barred from referring to the ICC the issue of whether their discount tariffs are consistent with the Act. This argument, if accepted, would significantly expand the financial exposure of shippers while impeding the Commission's ability to interpret and apply the Act.

onable rate defense to a suit by a carrier who has promptly billed for the freight alleged to be owing."). Because the issue on which the circuits are divided is being widely litigated, this Court will have another opportunity to address the question in a case that properly presents it. Review of the court of appeals' unpublished decision in this case is not warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] We note that our brief in opposition was in error in indicating that petitioner is in bankruptcy proceedings. See Br. in Opp. 5, 7, 8 n.4. Petitioner has liquidated its operations, Pet. App. 2a, 9a, and is no longer an operating motor carrier. Although petitioner has not filed for bankruptcy, the more characteristic situation in which insolvent motor carriers have sued for undercharges does involve bankruptcy proceedings, see, *e.g.*, *Maislin*, 110 S. Ct. at 2764, and at least one court of appeals took bankruptcy procedures into account in denying referral. See *Carolina Motor Express*, App., *infra*, 10a-11a n.4. This Court may wish to await a case involving a bankrupt carrier seeking to collect undercharges in order to consider the interaction of the bankruptcy laws and the primary jurisdiction doctrine.

Carolina Motor Express, Inc., 1. D. No. 56-1299892

Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc., Plaintiffs v. California Consolidated Enterprises, Inc., Defendant, SH-C-88-139.

United States District Court for the Western District of North Carolina, April 25, 1989.

Recovery of additional charges-Statutory duty of Commission-Primary Jurisdiction. --In a proceeding in which a carrier sought to recover additional charges from a shipper for the transportation of certain freight, a federal district court concluded that the lower court erred in denying the shipper's motion to refer the action to

the Interstate Commerce Commission for consideration of whether or not it would be an unreasonable practice for the shipper to make payments. The Commission has the statutory duty to determine whether a practice being conducted by a common carrier is reasonable and, therefore, invited district courts confronted with cases involving the collection of undercharges in a contract case to refer the issue of whether such practice was unreasonable to if for an advisory opinion, the court said. The court pointed out that continued adherence to the filed-rate doctrine in all undercharge situations has come under considerable scrutiny in several forums. The court agreed with the shipper's arguments that the issues raised in this case were within the primary jurisdiction of the ICC.

Back references.- Section 192.43; 247.75; 260.05.

Woodrow W. Jones, United States District The Defendant answered alleging that Judge: This Cause is before the Court upon an appeal by the Defendant, and a cross- authority by the Plaintiffs under the provisions of 28 U.S.C.A. Section 158(a) from a final judgment of the Bankruptcy Judge after a trial upon stipulated facts as to which there was no dispute.

The Plaintiffs, Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc., brought this action in the United States Bankruptcy Court for the Western District of North Carolina against the Defendant, California

Consolidated Enterprises, seeking to recover alleged undercharges and pas@ due accounts receivables based upon motor carrier tariffs on file with the Interstate Commerce Commission.

The Defendant answered alleging that Carolina Motor Express had contract carrier authority and that the freight involved in this controversy was transported under a negotiated rate contract and that those rates were paid. It further alleged that the rates sought to be applied here by the Trustee in Bankruptcy are unreasonable and unlawful and that the efforts of the Plaintiffs to apply higher rates and charges than those agreed upon between the parties constitutes an unreasonable, unlawful, unfair and deceptive practice by the carrier in violation of 49 U.S.C.A.

Section 10701.

The Defendant moved to refer the matter to the Interstate Commerce Commission under the doctrine of primary jurisdiction but the Bankruptcy Judge denied the motion. The case went to trial on a stipulation of facts and the Bankruptcy Judge found that the defense of contract carriage was non-existent and reliance by the Defendant on the negotiated rate was not reasonable. The Court further found that even if it h:d been found to be reasonable that the "filed rate" doctrine is still the law of the land and that the Plaintiffs should recover judgment against the Defendant in the sum of $58,793.03 on the undercharge claim :ind $4,804.55 on the accounts receivable claim.

The Court denied attorneys fees and interest on the undercharge claim but applied them to the accounts receivable claim.

The Defendant appealed from the judgment of the Bankruptcy Court and the Plaintiffs appealed from the Court's denial of its claim for attorneys fees and interest on the undercharge claim. At the hearing before this Court on April 7, 1989 the parties advised the Court that the accounts receivable claim had been settled and was no longer an issue in this cause.

There is no dispute as to the facts of this case. At the trial in Bankruptcy Court the parties stipulated to the following essential facts:

The Plaintiff, Langdon M. Cooper is the duly appointed and acting Trustee of Carolina Motor Express, Inc., appointed by the Court upon the f:ling of a petition under Chapter 11, later converted to a petition for relief under Chapter 7, of the United States Bankruptcy Code and the other Plaintiff, Mark & Associates was hired by the Debtor pursuant to a contract approved by the Court, to audit the Debtor's freight bills. The Debtor operated at all times under consideration in these proceedings as a motor carrier transporting freight in interstate commerce pursuant to both contract and common carriage authority by the Interstate Commerce Commission. The Debtor filed a tariff provision with the ICC, effective June 16, 1985, which provides that a late payment charge of 1.25% per month be applied to all freight

bills which are not paid within (15) days of delivery of the underlying freight and that when payment is not made within (30) days and it becomes necessary to refer the matter to an attorney for collection, the Debtor is entitled to reimbursement of reasonable attorneys fees computed at 33% of the transportation and the late payment charges.

The Defendant, California Consolidated Enterprises, Inc., is a California Corporation and holds authority issued by the ICC to operate as a broker of transportation and is subject to ICC regulations codified at 49 C. F. R. 1045. The Defendant tendered freight to the Debtor for transportation in interstate commerce which was transported by Debtor pursuant to its authority from the ICC. The Plaintiff Mark audited all

of the freight bills by comparing the commodities, weights, points of origin, destination and declared value of each shipment to the applicable common carrier tariff rate which the Debtor had on file with the ICC and
which was in effect on the date of each shipment handled for the Defendant. The results of said audit showed a balance due
of $58,793.03 which represents the balance due and owing to the Debtor by the Defendant for transportation charges rated pursuant to the lowest applicable common carrier tariff after all credits had been issued to the Defendant for previous payments made to the Debtor.

The Defendant was aware at all times involved in this proceeding that the Debtor, when transporting freight as a

common
carrier, was required to charge for its transportation services pursuant to the tariffs it had on file with the ICC. the Debtor's employees or agents, as an inducement to secure the Defendant's business, orally quoted to the Defendant certain freight rates and charges for the transportation of specified commodities between named origin and destination points. The quoted freight rates and charges were discussed by the Defendant and the Debtor's agents in various telephone conversations between them, and were set forth in a letter. Following the completion of the negotiations between the parties, the quoted freight rates were accepted by the Defendant. During those negotiations the Debtor's employees or agents represented to the Defendant that the quoted rates and charges would

cover the period that the
shipments moved. The Defendant believed that the Debtor would publish the quoted freight rates in its tariff filed with the ICC. The Defendant requested the Debtor to furnish it a copy of its tariff, but it was never produced. The Debtor's original freight bills for the shipments confirmed the negotiated freight rates and charges and confirmed the Defendant's belief that the Debtor had published the negotiated rates and charges in appropriate tariffs, filed properly with the ICC. The Defendant was billed for the shipments at the negotiated rates, and the Defendant has now paid all of such charges.

After the Defendant had made payment of the original transportation charges, the Plaintiffs billed the Defendant at a

higher rate for the same shipments, alleging that the higher rates and charges were those actually stated in the pertinent tariffs filed with the ICC during the period when the shipments moved and confirmed that the negotiated rates were never published by the Debtor in tariffs filed with the ICC. Based upon the negotiated rates and charges agreed upon by the parties the Defendant relied upon the representation of the employees and agents of the Debtor and utilized the Debtor's services, instead of other available motor carriers. Although the Defendant believed it had a contract with the Debtor, a written, bilateral contract, imposing specific obligations upon both the Defendant and the Debtor, and covering the shipments, was never executed by the Defendant and the Debtor.

The Plaintiffs rely upon the provisions of 49 U. S. C. A. Section 10761 (a) and the various court decisions construing the section for their support of the claims in this cause. The pertinent part of Section 10761(a) is as follows:

> That a carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Court interpretation of this statute has created the "filed rate" doctrine which is simply a rule of law that requires carriers subject to the Interstate Commerce Act to collect and for their shippers to pay, all lawful charges set forth in the applicable tariffs. Louisville & Nashville Railroad Co. v. Maxwell, 237 U. S. 94, 97, 35 S. Ct. 494, 495, 59 L. Ed. 853 (1915). This case holds that the rate of the carrier duly filed is the only lawful charge and deviation from it is not permitted upon any pretext. The purpose of the "filed rate" doctrine is to prevent carriers from giving by secret agreements discriminatory preferences to large volume shippers. See Armour Packing Co. v. United States, 209 U.S. 56, 81, 28 S. Ct. 428, 435, 52 L. Ed. 681 (1908). Generally, these cases hold that

affirmative defenses are not available to a carrier's claim for undercharges.

The Defendant says and contends that this case should not be determined by the "filed rate" doctrine but instead that Plaintiffs' claim should be referred to the Interstate Commerce Commission for a determination of whether the carrier's attempt to collect undercharges in this case constitutes an unreasonable practice. This contention is based upon the provisions of 49 U. S. C. A. Section 10701(a) which provides that "a rate (other than a rail rate), classification rule, or practice related to transportation or services provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable" (emphasis added) The

Defendant contends that the Commission has "primary jurisdiction" to determine whether the practice in this case is reasonable. "Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such case the judicial process is suspended pending referral of such issues to the administrative body for its views." United States v. Western Pacific Railroad Co., 352 U. S. 59, 63-64, 77 S. Ct. 161, 164-165, 1 L. Ed. 2d 126 (1956).

The Defendant relies upon the statute, a recent court decision, Seaboard System Railroad, Inc. v. United

States, 794 F. 2d 635 (11th Cir. 1986) and an ICC policy statement to support its motion to refer this matter to the ICC. The Defendant contends that if the Commission found that Plaintiffs' attempt to collect the undercharges the facts of this case is an unreasonable practice such decision would provide the basis for a defense of equitable estoppel to the Plaintiffs' claim in this Court. In Seaboard, the court reviewed and affirmed an ICC determination that a carrier was barred from collecting undercharges. The Court noted that the Commission had departed from its prior decisions regarding the "filed rate" doctrine but approved such action because the changed policy was in keeping with the Commission's statutory mission as set forth in the Act. Id. at 639. In 1986 the Commission adopted a policy statement

which provides among other things:

> "In light of the Motor Carrier Act of 1980 the filed rate doctrine does not necessarily bar equitable defenses. . . [and] if a case is referred to the [ICC, it] will decide if the collection of the undercharges would be an unreasonable practice." In reaching this conclusion the ICC discussed and defended its policy statement. It admitted that it did not have the authority to abrogate Section 10761 and therefore could not order the waiver of undercharges since the United States District Courts are the only bodies that can hear

> undercharge cases. Nevertheless, the Commission defended on several grounds its authority to consider all the circumstances surrounding an undercharge action brought in district court.

First, the Commission cited Seaboard, supra, as authority for the proposition that Section 10701(a) gives it the authority to consider whether a particular undercharge suit is an unreasonable practice.

Second, the Commission asserted that in particular circumstances it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim of undercharges. That the filed rate doctrine was not intended to condone or

reward carriers where such carrier's action may constitute fraudulent business practices.

Third, the Commission recognized that a new regulatory environment may have been produced by the Motor Carrier Act of 1980 and that, therefore, a fresh look was required in order to formulate the "proper regulatory response to the matter of unfiled negotiated motor carrier rates."

The Commission stated that the Motor Carrier Act of 1980 dramatically altered the competitive atmosphere of the motor carrier industry. The relaxation of regulatory requirements and Commission oversight has resulted in intense, new competition. Thousands of carriers have entered the market with broad operating

authority and increased pricing freedom. The new business atmosphere requires these carriers to price competitively and on extremely short notice. . . Hundreds, or even thousands, of individual motor common carrier rates are negotiated daily. In these circumstances, it can be extremely difficult for shippers to determine, prior to movement whether the agreed rate is actually on file. (Ex Parte No. MC-177, Oct. 29, 1986.)

The Commission has the statutory duty to determine whether a practice being conducted by a common carrier is reasonable and therefore invited district courts confronted with cases involving the collection of undercharges in a contract case to refer the issue of whether such practice was unreasonable to it for an advisory opinion. Some courts

have decided to take advantage of the expertise of the Commission in this field and stayed the proceeding while the issue was presented for review. Others have refused including the Bankruptcy Judge in this case. Briefly stated the Bankruptcy Judge determined that the "defense of contract carriage is nonexistent and reliance by the Defendant on the negotiated rate was not reasonable, and even if it had been Found to be reasonable that the `filed rate' doctrine is still the law of the land..." The Bankruptcy Court also denied the Defendant's motion to refer the matter to the ICC on the grounds that such referral would be improper and would result in an unnecessary delay of the proceedings.

This Court finds and concludes that the Bankruptcy Judge erred as a matter of

law in failing and refusing to refer to the ICC the issue of whether under the facts of this case it would be an unreasonable practice for the shipper to be required to pay the undercharge claim. This Court will therefore enter a judgment reversing the judgment of the Bankruptcy Court and ordering the issue referred to the Interstate Commerce Commission.

The facts in this case are basically undisputed. Carolina provided regulated transportation of goods in interstate commerce to the Defendant and the rate charged, billed and paid was less than the filed rate. Title 49 U. S. C. A. Section 10762(a)(1) of the Interstate Commerce Act, requires all motor common carriers to publish and file a tariff containing their rates for transporting

freight. This rate becomes the legal rate and the carrier is obligated to charge and collect that rate.

Historically there have been no exceptions to this rule, known as the "filed rate doctrine." The Supreme Court stated almost seventy-five years ago that, "ignorance or misquotation is not an excuse for either paying or charging less or more than the rate filed." Louisville & Nashville Railroad Co v. Maxwell, supra; Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U.S. 577, 40 S. Ct. 27 (1919). Thus, in the past, shippers have been precluded from raising equitable defenses in undercharge actions by common carriers under the filed rate doctrine. See, e.g., Fry Trucking Co. v. Shenandoah Quarry, Inc., 628 F. 2d 1360 (D.C. Cir.

1980) and Nyad Motor Freight, Inc. v. W. T. Grant Co., 486 F.2d 1112 (2nd Cir. 1973).

The climate of the trucking industry has changed considerably during this decade as evidenced by three rather significant developments. As a result, the continued adherence to the filed rate doctrine in all undercharge situations has come under considerable scrutiny in several forums. First of all, by enacting the Motor Carrier Act of 1980, Pub. L. No. 98-296, 94 Stat. 793, (49 U. S. C. A. Sections 10101 et seq.), Congress intended to substantially deregulate the industry by allowing carriers and shippers to negotiate rate arrangements more freely. See, e. g., Maislin Industries v. Primary Steel, Inc., No. 85-0021 -CV-W-JWD, - F. Supp. - (W. D.

Mo. July 22, 1988); and Orr v. I.C.C., 703 F. Supp. 676 (W. D. Tenn. 1988).

The second important development came about due in part to Seaboard System Railroad, Inc. v. United States, 794 F. 2d 635(11th Cir. 1986). Title 49 U. S. C. A. Section 10701(a) provides that a rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable. In Seaboard the Eleventh Circuit was dealing with a rail carrier's petition for review of an order of the Interstate Commerce Commission determining that the collection of undercharges was unreasonable in that case and waiving the collection from the shipper. Relying in part on Nader v.Alleghany Airlines, Inc., 426 U.S. 290,

96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976), the Court agreed with the Commission that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." Seaboard, 794 F. 2d at 638. The Court, agreeing with the Commission "that `changed circumstances' warranted a re-examination of its previous policy of refusing to consider equitable defenses," stated:

The Commission's action in this case is both justified and within its jurisdiction. It is not contrary to Maxwell and related cases, as those dealt only with the Court's authority to grant equitable defenses to undercharge actions. The Interstate Commerce Act, as

amended, still embodies the policies of nondiscrimination and uniformity. The primary authority to give effect to those policies, though, it reposed in the ICC. Cf. Nader, 426 U.S. at 304, 96 S. Ct. at 1987. Nothing prohibits the ICC from changing its policy on enforcing the `unreasonable practice' provision of section 10701(a).

The third important development was the change in the policy of the Interstate Commerce Commission as set forth in its Negotiated Rates opinion in Ex Parte No. MC-177 (Oct. 29,1986) Declaring that it had been directed by 49 U. S. C. A. Section 10101(a)(2) to encourage competitive, innovative, and

individualized price and service options to meet changing market demand the Commission held it would recognize equitable defenses on a case by case basis where it is shown that to allow collection of undercharges would be an unreasonable practice. In other words, the Commission decided that in some cases it might very well be an unreasonable practice to allow carriers to negotiate a rate below the tariff to gain business and then later bring suit to recover the "undercharges" after completing the job and after accepting payment at the negotiated rate. The ICC cited as authority 49 U. S. C. A. Section 107701(a) which requires practices under ICC authority to be reasonable and Section 10704(a) (1) which authorizes the Commission to order a carrier to stop a violation. Orr. v. I.C.C., 703 F. Supp.

at 677; Younger v. TMBR Drilling, Inc., No. Mo-85-CA20 (W. D. Texas, Sept. 23, 1987) and Maislin Industries, supra. Thus, the law in this area has entered a new era but there is a split of authority as to whether the Commission:

(1) has authority or jurisdiction to declare a "practice" unreasonable and thus circumvent the filed rate doctrine, i. e., whether referral to the Commission is proper; (2) whether such a position is contrary to well-settled law, and (3) whether the courts can or should adopt the findings of the Commission as to unreasonable practices.

The Defendant claims and the Court agrees that the issues raised in this cause are within the primary jurisdiction of the ICC. In reaching this conclusion the Court relies upon the statute,

[Section 10701 (a)], the ICC opinion [Ex Parte No. MC-177]; Seaboard v. United States, supra; Motor Carrier v. Family Dollar, 670 F. Supp. 644 (W.D. N.C. 1987); Orr v. I.C.C., supra, and Younger v. TMBR Drilling, Inc., supra.

Having reached the conclusion that the ICC has primary jurisdiction of the issues in this cause it follows that the matter should be referred to the Commission and that further proceedings in this Court be stayed until the Commission acts. United States v. Western Pacific R. Co., 352 U.S. 61, 77 S. Ct. 161 at 165.

A judgment will be entered reversing the judgment of the Bankruptcy Court and referring the issue to the Interstate Commerce Commission for a determination

as to whether the collection of the undercharges in this case would be an unreasonable practice. Further proceedings will be stayed in this Court until the Commission rules on the matter.

This the 21st day of April, 1989.

[Paragraph 83,465] Carolina Motor Express, Inc., 1. D. No. 56-1299892.

Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc., and Mark & Associates of North Carolina, Inc., Plaintiffs v. Peter C. Reiter, Defendant, SH-C-88-138.

United States District Court For the Western District of North Carolina, April 25, 1989.

Federal court-Referral of undercharge action --Primary jurisdiction of ICC.-- A federal district court has allowed a shipper to refer an undercharge claim brought against it by a carrier to the ICC for consideration. The court concluded that the Commission has primary jurisdiction in this action to determine whether, under the facts of this case, it would be an unreasonable practice for the shipper to be required to pay the undercharge claim.

Woodrow W. Jones, United States District Judge: This cause is before the Court upon an appeal by the Defendant, and a cross-appeal by the Plaintiffs, pursuant to 28 U. S. C. A. Section 158(a), from a final judgment of the United States Bankruptcy Court for the Western District of North Carolina. This

Court heard arguments from counsel for both parties on April 7, 1989, in Rutherfordton, North Carolina.

Plaintiffs, Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc., and Mark & Associates of North Carolina, Inc., originally brought this action seeking to recover alleged undercharges. Plaintiffs alleged the rates paid by Defendant for various shipments of freight were less than the rates on file with the Interstate Commerce Commission (ICC).

Defendant answered by alleging that: (1) the rates Plaintiffs seek to collect are unreasonable and unlawful in violation of 49 U. S. C. A. Section 10701(a); (2) the tariff sections containing the rates Plaintiffs seek to

apply to the shipments in question are not the applicable sections of said tariffs, and if applied to the shipments in question, would violate 49 U. S. C. A. Sections 10761 and 10762; and (3) allowing the collection of the tariff rates after lower rates have been negotiated and agreed upon by both parties is an unreasonable practice in violation of 49 U. S. C. A. Section 10701(a).

Defendant further disputes the nature of the authority under which the shipments were moved. Defendant argues that all shipments were moved pursuant to Carolina's contract carriage authority as opposed to common carriage authority. Defendant alleges the shipments were moved pursuant to a valid, binding contract between Carolina and Defendant.

Therefore the filed tariff provisions of the Interstate Commerce Act would not apply.

Defendant filed a motion for referral to the ICC. The motion was denied by the Bankruptcy Court. The case was tried before that Court upon stipulated facts which are not in dispute before this Court.

The Bankruptcy Court found the defense of contract carriage to be non-existent in this case. It found that Defendant's reliance on the rate negotiated was unreasonable and that even had there been reasonable reliance, the "filed rate" doctrine is still the law requiring judgment in favor of Plaintiffs on the undercharge claim in the sum of $13,795.73. The Court refused to approve

attorneys fees finding the conduct of both parties to be such that each bear its own costs. As to interest on the undercharges the Court allowed the statutory rate from the date of judgment until paid but refused to award any prejudgment interest.

The Defendant appeals the Bankruptcy Court's judgment alleging that: (1) under the doctrine of "primary jurisdiction" the Court should have referred the case to the Interstate Commerce Commission for the determination of the reasonableness and applicability of the tariffs, (2) that Carolina moved the goods as a contract carrier,thus the filed rate doctrine should not apply, and, (3) that the practice of assessing higher freight rates and charges than those agreed upon constitutes an unreasonable, unlawful,

unfair, and deceptive practice. Plaintiffs cross-appeal claiming the Bankruptcy Court's denial of Plaintiffs' request for prejudgment interest and attorneys fees, provided for in Carolina's filed tariffs, is contrary to law.

There is no dispute as to the facts of this case. At the trial before the Bankruptcy Court the parties stipulated to the following essential facts. The Plaintiff, Langdon M. Cooper, is the duly appointed and acting Trustee of Carolina Motor Express, Inc., (hereinafter Debtor), appointed by the Court on November 7, 1986 upon the filing of a petition under Chapter 11, later converted to a petition for relief under Chapter 7, of the United States Bankruptcy Code. Mark & Associates, also

Plaintiff in this action, was hired to audit the Debtor's bills and records and was approved by the Court to perform this task The Debtor operated at all times under consideration in these proceedings as a motor carrier transporting freight in interstate commerce pursuant to both contract and common carriage authority issued by the ICC. The Debtor filed a tariff provision with the ICC on June 4, 1985, effective June 16, 1985, which provides that a late payment charge of 1.25% per month be applied to all freight bills which are not paid within (15) days of delivery of the underlying freight and that when payment is not made within (30) days and it becomes necessary to refer the matter to an attorney for collection, the Debtor is entitled to reimbursement of reasonable attorneys fees computed at 33% of the transportation and late

payment charges.

The Defendant, Peter C. Reiter, operates a sole proprietorship in Fountain Valley, California authorized by the ICC as a broker of transportation by motor vehicle. As such, Defendant is subject to the ICC regulations codified at 49 C. F. R. 1045. The Defendant tendered freight to the Debtor for transportation in interstate commerce which was transported by Debtor pursuant to its authority from the ICC. The Plaintiff Mark audited all of the freight bills by comparing the commodities, weights, points of origin, destination and declared value of each shipment to the applicable common carrier tariff rate which the Debtor had on file with the ICC and which was in effect on the date of each shipment handled for the Defendant.

The results of said audit showed a balance due of $13,795.73 which represents the balance due and owing to the Debtor by the Defendant for transportation charges rated pursuant to the lowest applicable common carrier tariff after all credits had been issued to the Defendant for previous payments made to the Debtor.

The Defendant was aware at all times involved in this proceeding that the Debtor, when transporting freight as a common carrier, was required to charge for its transportation services pursuant to the tariffs it had on file with the ICC. The Debtor's employees or agents, as an inducement to secure the Defendant's business, orally quoted to the Defendant certain freight rates and charges for the transportation of specified commodities

between named origin and destination points. The quoted freight rates and charges were discussed by the Defendant and the Debtor's agents in various telephone conversations between them, and were set forth in a letter. Daring those negotiations the Debtor's employees or agents represented to the Defendant that the quoted rates and charges would cover the period that the shipments moved. Following the completion of the negotiations between the parties, the quoted freight rates were accepted by the Defendant. The Defendant believed that the Debtor would publish the quoted freight rates in its tariff filed with the ICC. The Defendant requested the Debtor to furnish it a copy of its tariff, but it was never produced. Debtor represented to Defendant that the tariff was too "voluminous." The Debtor's

original freight bills for the shipments confirmed the negotiated freight rates and charges and confirmed the Defendant's belief that the Debtor had published the negotiated rates and charges in appropriate tariffs, filed properly with the ICC. The Defendant was billed for the shipments at the negotiated rates, and the Defendant has now paid all of such charges.

After Defendant had made payment of the original transportation charges, Plaintiffs billed Defendant at a higher rate for the same shipments, alleging that the higher rates and charges were those actually stated in the pertinent tariffs filed with the ICC during the period when the shipments moved and confirmed that the negotiated rates were never published by the Debtor in tariffs

filed with the ICC. Based upon the negotiated rates and charges agreed upon by the parties, the Defendant relied upon the representation of the employees and agents of the Debtor and utilized the Debtor's services, instead of other available motor carriers. Although the Defendant believed it had a contract with the Debtor, a written, bilateral contract, imposing specific obligations upon both the Defendant and the Debtor, and covering the shipments, was never executed by the Defendant and the Debtor.

The Plaintiffs rely upon the provisions of 49 U. S. C. A. Section 10761(a) and the various court decisions construing the section for their support of the claims in this cause. The pertinent part of Section 10761(a) is as follows:

> That a carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Court interpretation of this statute has created the "filed rate" doctrine which is simply a rule of law that requires carriers subject to the Interstate Commerce Act to collect and for their shippers to pay, all lawful charges set forth in the applicable

tariffs. Louisville & Nashville Railroad Co. v. Maxwell, 237 U. S. 94, 97, 35 S. Ct. 494, 495, 59 L. Ed. 853 (1915). This case holds that the rate of the carrier duly filed is the only lawful charge and deviation from it is not permitted upon any pretext. The purpose of the "filed rate" doctrine is to prevent carriers from giving by secret agreements discriminatory preferences to large volume shippers. See Armour Packing Co. v. United States, 209 U. S. 56, 81, 28 S. Ct. 428, 435, 52 L. Ed. 681 (1908). Generally, these cases hold that affirmative defenses are not available to a carrier's claim for undercharges.

The Defendant says and contends that this case should not be determined by the "filed rate" doctrine but instead that Plaintiffs' claim should be referred to

the Interstate Commerce Commission for a determination of whether the carrier's attempt to collect undercharges in this case constitutes an unreasonable practice. This contention is based upon the provisions of 49 U. S. C. A. Section 10701(a) which provides that "a rate (other than a rail rate), classification rule, or practice related to transportation or services provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable." (emphasis added). The Defendant contends that the Commission has "primary jurisdiction" to determine whether the practice in this case is reasonable. "Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim

requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such case the judicial process is suspended pending referral of such issues to the administrative body for its views." United States v. Western Pacific Railroad Co., 352 U. S. 59, 63-64, 77 S. Ct. 161, 164 165, 1 L. Ed. 2d 126 (1956).

The Defendant relies upon the statute, a recent court decision, Seaboard System Railroad, Inc. v. United States, 794 F. 2d 635 (11th Cir. 1986) and an ICC policy statement to support its motion to refer this matter to the ICC. The Defendant contends that if the Commission found that Plaintiffs' attempt to collect the undercharges under the facts of this case is an unreasonable

practice such decision would provide the basis for a defense of equitable estoppel to the Plaintiffs' claim in this Court. In Seaboard, the court reviewed and affirmed an ICC determination that a carrier was barred from collecting undercharges. The Court noted that the Commission had departed from its prior decisions regarding the "filed rate" doctrine but approved such action because the changed policy was in keeping with the Commission's statutory mission as set forth in the Act. Id. at 639. In 1986 the Commission adopted a policy statement which provides among other things:

"In light of the Motor Carrier Act of 1980 the filed rate doctrine does not necessarily bar equitable defenses . . . [and] if a case is referred to the (ICC, it] will decide if the collection of the

undercharges would be an unreasonable practice." In reaching this conclusion the ICC discussed and defended its policy statement. If admitted that it did not have the authority to abrogate Section 10761 and therefore could not order the waiver of undercharges since the United States District Courts are the only bodies that can hear undercharge cases. Nevertheless, the Commission defended on several grounds its authority to consider all the circumstances surrounding an undercharge action brought in district court.

First, the Commission cited Seaboard, supra, as authority for the proposition that Section 10701(a) gives it the authority to consider whether a particular undercharge suit is an unreasonable practice.

Second, the Commission asserted that in particular circumstances it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim of undercharges. That the filed rate doctrine was not intended to condone or reward carriers where such carrier's action may constitute fraudulent business practices.

Third, the Commission recognized that a new regulatory environment may have been produced by the Motor Carrier Act of 1980 and that, therefore, a fresh look was required in order to formulate the "proper regulatory response to the matter of unfiled negotiated motor carrier rates."

The Commission stated that the Motor

Carrier Act of 1980 dramatically altered the competitive atmosphere of the motor carrier industry. The relaxation of regulatory requirements and Commission oversight has resulted in intense, new competition. Thousands of carriers have entered the market with broad operating authority and increased pricing freedom. The new business atmosphere requires these carriers to price competitively and on extremely short notice . . . Hundreds, or even thousands, of individual motor common carrier rates are negotiated daily. In these circumstances, it can be extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file. (Ex Parte No. MC-177, Oct. 29, 1986.)

The Commission has the statutory

duty to determine whether a practice being conducted by a common carrier is reasonable and therefore invited district courts confronted with cases involving the collection of undercharges in a contract case to refer the issue of whether such practice was un reasonable to it for an advisory opinion. Some courts have decided to take advantage of the expertise of the Commission in this field and stayed the proceeding while the issue was presented for review. Others have refused including the Bankruptcy Judge in this case. Briefly stated the Bankruptcy Judge determined that the "defense of contract carriage is nonexistent and reliance by the Defendant on the negotiated rate was not reasonable, and even if it had been found to be reasonable that the `filed rate' doctrine is still the law of the land .

. . " The Bankruptcy Court also denied the Defendant's motion to refer the matter to the ICC on the grounds that such referral would be improper and would result in an unnecessary delay of the proceedings.

This Court finds and concludes that the Bankruptcy Judge erred as a matter of law in failing and refusing to refer to the ICC the issue of whether under the facts of this case it would be an unreasonable practice for the shipper to be required to pay the undercharge claim. This Court will therefore enter a judgment reversing the judgment of the Bankruptcy Court and ordering the issue referred to the Interstate Commerce Commission.

The facts in this case are basically

undisputed. Carolina provided regulated transportation of goods in interstate commerce to the Defendant and the rate charged, billed and paid was less than the filed rate. Title 49 U. S. C. A. Section 10762(a)(1) of the Interstate Commerce Act, requires all motor common carriers to publish and file a tariff containing their rates for transporting freight. This rate becomes the legal rate and the carrier is obligated to charge and collect that rate.

Historically there have been no exceptions to this rule, known as the "filed rate doctrine." The Supreme Court stated almost seventy-five years ago that, "ignorance or misquotation is not an excuse for either paying or charging less or more than the rate filed." Louisville & Nashville Railroad Co. v.

Maxwell, supra. The rationale underlying the filed-rate doctrine is to avoid rate discrimination in favor of large shippers through secret agreements with carriers. Louisville & Nashville Railroad Co. v. Maxwell, supra; Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink, 250 U. S. 577, 40 S. Ct. 27 (1919). Thus, in the past, shippers have been precluded from raising equitable defenses in undercharge actions by common carriers under the filed rate doctrine. See, e. g., Fry Trucking Co. v. Shenandoah Quarry, Inc., 628 F. 2d 1360 (D. C. Cir. 1980) and Nyad Motor Freight, Inc. v. W. T. Grant Co., 486 F. 2d 1112 (2nd Cir. 1973).

The climate of the trucking industry has changed considerably during this decade as evidenced by three rather

significant developments. As a result, the continued adherence to the filed rate doctrine in all undercharge situations has come under considerable scrutiny in several forums. First of all, by enacting the Motor Carrier of 1980, Pub. L. No. 96-296, 94 Stat. 793, (49 U. S. C. A. Section 10101 et seq.), Congress intended to substantially deregulate the industry by allowing carriers and shippers to negotiate rate arrangements more freely. See e.g. Maislin Industries v. Primary Steel, Inc., No. 85-0021-CV-W-JWD, -- F. Supp. -- (W.D. Mo. July 22, 1988); and Orr v. I. C. C., 703 F. Supp. 676 (W.D. Tenn. 1988).

The second important development came about due in part to Seaboard System Railroad, Inc. v. United States, 794 F. 2d 635 (11th Cir. 1986). Title 49 U. S.

C. A. Section 10701(a) provides that a rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable. In Seaboard the Eleventh Circuit was dealing with a rail carrier's petition for review of an order of the Interstate Commerce Commission determining that the collection of undercharges was unreasonable in that case and waiving the collection from the shipper. Relying in part on Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 96 S. Ct. 1978, 48 L. Ed. 2d 643 (1976), the Court agreed with the Commission that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." Seaboard, 794 F. 2d at 638. The Court,

agreeing with the Commission "that 'changed circumstances' warranted a re-examination of its previous policy of refusing to consider equitable defenses," stated:

> The Commission's action in this case is both justified and within its jurisdiction. It is not contrary to Maxwell and related cases, as those dealt only with the Court's authority to grant equitable defenses to undercharge actions. The Interstate Commerce Act, as amended, still embodies the policies of non-discrimination and uniformity. The primary authority to give effect to those policies, though, is reposed in the ICC. Cf. Nader,

426 U. S. at 304, 96 S. Ct. at 1987. Nothing prohibits the ICC from changing its policy on enforcing the `unreasonable practice' provision of section 10701(a).

The third important development was the change in the policy of the Interstate Commerce Commission as set forth in its Negotiated Rates opinion in Ex Parte No. MC-177 (Oct. 29, 1986). Declaring that it had been directed by 49 U. S. C. A. Section 10101(a)(2) to encourage competitive, innovative, and individualized price and service options to meet changing market demand the Commission held it would recognize equitable defenses on a case by case basis where it is shown that to allow collection of undercharges would be an

unreasonable practice. In other words, the Commission decided that in some cases it might very well be an unreasonable practice to allow carriers to negotiate a rate below the tariff to gain business and then later bring suit to recover the "undercharges" after completing the job and after accepting payment at the negotiated rate. The ICC cited as authority 49 U. S. C. A. Section 10701(a) which requires practices under ICC authority to be reasonable and Section 10704(a)(1) which authorizes the Commission to order a carrier to stop a violation. Orr v. I. C. C., 703 F. Supp. at 677; Younger v. TMBR Drilling, Inc., No. Mo-85-CA20 (W. D. Texas, Sept. 23, 1987) and Maislin Industries, supra. Thus, the law in this area has entered a new era but there is a split of authority as to whether the Commission: (1) has

authority or jurisdiction to declare a "practice" unreasonable and thus circumvent the filed rate doctrine, i. e., whether referral to the Commission is proper; (2) whether such a position is contrary to well-settled law, and (3) whether the courts can or should adopt the findings of the Commission as to unreasonable practices.

The Defendant claims and the Court agrees that the issues raised in this cause are within the primary jurisdiction of the ICC. In reaching this conclusion the Court relies upon the statute, [Section 10701(a)], the ICC opinion [Ex Parte No. MC-177]; Seaboard v. United States, supra; Motor Carrier v. Family Dollar, 670 F. Supp. 644 (W. D. N. C. 1987); Orr v. I.C.C., supra, and Younger v. TMBR Drilling, Inc., supra.

Having reached the conclusion that the ICC has primary jurisdiction of the issues in this cause it follows that the matter should be referred to the Commission and that further proceedings in this Court be stayed until the Commission acts. United States v. Western Pacific R. Co., 352 U. S. 61, 77 S. Ct. 161 at 165.

A judgment will be entered reversing the judgment of the Bankruptcy Court and referring the issue to the Interstate Commerce Commission for a determination as to whether the collection of the undercharges in this case would be an unreasonable practice. Further proceedings will be stayed int his Court until the Commission rules on the matter.

This the 21st day of April, 1989.

[¶83,361] Carolina Motor Express, Inc., I.D. No. 56-1299892; Case No. SH-B-86-00226.

Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc., Plaintiffs v. California Consolidated Enterprises, Inc., and Peter C. Reiter, Defendants; Adversary Proceeding Nos. 86-0498 and 87-0028.

United States Bankruptcy Court for the Western District of North Carolina, Shelby Division, March 16, 1988.

Recovery of freight undercharges--Filed-rate doctrine--Upheld.--In an action in which a carrier sought to recover undercharges from certain shippers for services rendered, a federal bankruptcy court concluded that reliance by the shippers on negotiated

rates was not reasonable since the "filed-rate" doctrine took precedence. Because the carrier operated as a motor common carrier transporting freight in interstate commerce pursuant to authority issued by the ICC, it was required to charge all of its customers tariff rates it had on file with the ICC. In spite of the fact that the carrier's employees or agents, as an inducement to secure the shippers' business, orally quoted to the shippers certain freight rates and charges for the transportation of specified commodities. These rates were never published by the carrier in its filed tariffs. The Shippers failed to make a reasonable investigation or check with regard to the legal tariffs. The court found that the shippers were ICC licensed brokers who were bound by laws and ICC regulations concerning the

payment of freight charges.

Back references.-189.03; 192.43; 247.75.

Undercharges--Contract carriage claim --Found non-existent.-- There was no merit to the claim that the shippers dealt with the carrier as a contract carrier, and that the rates agreed upon by themselves and the carrier were part of the oral contract. None of the shippers executed written, bilateral contracts with the carrier which imposed specific obligations upon both the carrier and each of the shippers, and which covered a series of shipments as required by the ICC regulations for contract carriage. Also, the shippers have failed to show that they had any agreement with the carrier which provided that the carrier would dedicate equipment for a continuing period of time for their exclusive use,

or provide special equipment or services designed to meet the carrier's distinct needs, as required for contract carriage under the Interstate Commerce Act. A contract limited to the freight bills and bills of lading is specifically excluded from the definition of contract carriage. Furthermore, referral of the proceeding to the ICC would be improper and any decision rendered by the Commission therefrom is considered a nonbinding advisory opinion.

Back references.-189.03; 192.43; 247.75.

Opinion delivered by U.S. Bankruptcy Judge Wooten: These Matters coming on to be heard and being heard before the undersigned Judge presiding over the United States Bankruptcy Court for the Western District of North Carolina, on February 16, 1988, at a

bench trial on the Complaints of Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc., Debtor, and Mark & Associates of North Carolina, Inc., as Plaintiffs, seeking money damages against California Consolidated Enterprises, Inc. and Peter C. Reiter, Defendants, for the failure of Defendants to fully pay freight charges owed to the Debtor for services rendered by the Debtor to these Defendants; and the parties having stipulated to all facts at issue in these proceedings and having agree to consolidate these proceedings for trial; and the Court, after reviewing the record and stipulated facts in these proceedings, and after hearing the argument of counsel, pursuant to Bankruptcy Rule 7052 makes the following Findings of Facts and Conclusions of Law:

Findings of Facts

These actions arose upon the filing of Complaints jointly by Langdon M. Cooper, the duly appointed qualified and currently serving Trustee of Carolina Motor Express, Inc., Debtor (hereinafter called the "Debtor") and Mark & Associates of North Carolina, Inc. (hereinafter called "Mark") against the Defendants who are former customers of the Debtor. Pursuant to an audit contract approved by this Court on July 15, 1986, Mark audited the Defendants' freight bills for the purpose of determining whether said bills were properly rated according to the common carrier tariffs that the Debtor had on file with the Interstate Commerce Commission (ICC) and which were in effect at the date of each shipment.

The Debtor operated at all times

under consideration in these proceedings as a motor common carrier transporting freight in interstate commerce pursuant to authority issued by the ICC. As such, the Debtor was required to charge all of its customers pursuant to the tariffs it has on file with the ICC. The Debtor, however, did not initially charge the Defendants in these proceedings its published tariff rates.

Defendant, California Consolidated Enterprises, Inc. (hereinafter "CCE"), is a California corporation with a principal place of business at 14704 Radburn, Santa Fe Springs, California.

The Debtor's employees or agents, as an inducement to secure CCE's business, orally quoted to CCE certain freight rates and charges for the transportation of specified commodities between named origin and destination

points. The quoted freight rates and charges were discussed by CCE and the Debtor's agents in various telephone conversations between them, and were set forth in a letter.

Following the completion of the negotiations between the parties, the quoted freight rates were accepted by CCE. During those negotiations the Debtor's agents or employees represented to CCE that the quoted freight rates and charges would cover the period that the shipments moved. CCE believed that the Debtor would publish the quoted freight rates in its tariffs filed with the ICC. CCE asked the Debtor for a copy of its tariff, but it was never produced.

The Debtor's original freight bills for the shipments confirmed the negotiated freight rates.

CCE was billed for the shipments at

the negotiated rate, and CCE has paid to the Debtor all the original transportation charges for the shipments, with the exception of an uncontested balance owing the Debtor of $4,804.55 for previous unpaid invoices.

After CCE had made payment of the original transportation charges, the Plaintiffs billed CCE higher rates and charges for the same shipments, alleging that the higher freight rates and charges were those actually stated in the pertinent tariffs filed with the ICC during the period from December of 1983 through April of 1986, when the shipments moved. The orally quoted, agreed upon, and confirmed freight rates and charges were never published by the Debtor in tariffs filed with the ICC.

Based on the negotiated freight rates and charges agreed upon by the parties,

and which were originally assessed by the Debtor, on the shipments paid in full by CCE, CCE unreasonably relied on the representation of the employees and agents of the Debtor, and utilized the Debtor, instead of other available motor carriers, and failed to make any reasonable investigation, or check with regard to the legal tariffs, all of which they were equipped by knowledge and experience so to do, in short, through blind and unreasonable faith, Defendants participated in the illegal action of the Debtor to the detriment of the then Debtor entity.

Defendant, Peter C. Reiter (hereinafter called "Reiter") is a sole proprietorship with a principal place of business at 1041 Parakeet Circle, Fountain Valley, California.

The Debtor's employees or agents, as an inducement to secure Reiter's

business, orally quoted to Reiter certain freight rates and charges for the transportation of specified commodities between named origin and destination points. The quoted freight rates and charges were discussed by Reiter and the Debtor's agents in various telephone conversations between them, and were set forth in a letter. During the negotiations the Debtor's agents or employees represented to Reiter that the quoted freight rates and charges would cover the period that the shipments moved. Following the completion of the negotiations between the parties, the quoted freight rates were accepted by Reiter. Reiter believed that the Debtor would publish the quoted freight rates in its tariffs filed with the ICC. Reiter asked the Debtor for a copy of its tariff, but it was never produced, on the grounds that

it was too "voluminous."

The Debtor's original freight bills for the shipments confirmed the negotiated rate, and Reiter paid to the Debtor these original bills in full.

After Reiter had made payment of the original transportation charges, the Plaintiffs billed Reiter higher rates and charges for the same shipments, alleging that the higher freight rates and charges were those actually stated in the pertinent tariffs filed with the ICC during the period from January of 1985 through April of 1986, when the shipments moved.

The orally quoted, agreed upon, and confirmed freight rates and charges were never published by the Debtor in tariffs file with the ICC.

Based on the negotiated freight rates and charges agreed upon by the parties, and which were originally assessed by

the Debtor, on the shipments paid in full by Reiter, Reiter unreasonably relied on the representation of the employees and the agents of the Debtor, and utilized the Debtor, instead of other available motor carriers, and failed to make any reasonable investigation, or check with regard to the legal tariffs, all of which they were equipped by knowledge and experience so to do, in short, through blind and unreasonable faith, Defendants participated in the illegal action of the Debtor to the detriment of the then Debtor entity.

Both defendants are ICC licensed brokers who, pursuant to 49 C.F.R. Section 1045.10, are bound by laws and ICC regulations concerning the payment of freight charges.

Pursuant to the freight bill audit contract, Mark audited all of the

shipments handled by the Debtor for each of the Defendants by comparing the commodities, weights, points of origin, destination and declared value of each shipment to the applicable common carrier tariff rate which the Debtor had on file with the ICC, and which was in effect on the date of each shipment was handled for each Defendant.

The results of said audit produced balance invoices in the amounts of $58,793.03 owed by CCE and $13,795.73 owed by Reiter.

In addition to these balance due freight bills, the audit performed by Mark also revealed that Defendant CCE had failed to pay original invoices in the amount of $24,201.90. On March 31, 1987, CCE paid the Trustee $16,277.35 and submitted a proof of claim for $3,120.00, leaving an uncontested account receivable owed the Debtor of $4,804.55.

In response to the audit findings, Defendants claim that they dealt with the Debtor as a contract carrier, and that the rates agreed upon by themselves and the debtor were part of an oral contract. Alternatively, CCE and Reiter claim that they dealt with the Debtor as a common carrier, and relied upon the Debtor to file its negotiated rates with the ICC.

Additionally, each of the defendants has moved the Court for referral to the ICC. The asserted purpose of the Defendants' requests for ICC referral is to obtain an advisory determination frogm the ICC as to whether or not the Debtor's practices were unreasonable, and whether the Trustee and Mark should be permitted to enforce the filed tariff rates. The Court previously denied CCE and Reiter's Motion for Referral to the ICC by Order entered

March 25, 1987. These Defendants, reasserted their Motions to Refer at trial.

The Defendants were aware at all times involved in this proceeding that the Debtor, when transporting freight as a common carrier, was required to charge for its transportation services pursuant to the tariffs it had on file with the ICC. The Defendants negotiated rates with the Debtor without obtaining a copy of the Debtor's tariffs to verify that the Debtor had, indeed, filed these negotiated rates with the ICC.

While Defendants also raise as defense that they dealt with the Debtor as a contract carrier, none of the Defendants executed written, bilateral contracts with the Debtor which imposed specific obligations upon both the Debtor and each of the Defendants, and

which covered a series of shipments as required by the regulations for contract carriage codified at 49 C.F.R. 1053.1.

In addition, the Defendants have failed to show that they had any agreement with the Debtor which provided that the Debtor would dedicate equipment for a continuing period of time for their exclusive use, or provide special equipment or services designed to meet the Defendants' distinct needs, as required for contract carriage under the interstate Commerce Act. 49 U.S.C. Section 10102(15).

The Debtor's contract carriage Permit also provides that the Debtor may operate as a contract carrier only so long as the Debtor executes contracts pursuant to 49 C.F.R. 1053. The Permit further states that while it is unnecessary to file the contract with

the ICC "the execution of contracts must be accomplished."

Since the Court finds that there is no valid contract carriage, and since the parties have previously stipulated that the audit performed by Mark resulted in the lowest applicable common carrier charges, the Court adopts the audit findings by Mark as proper in all respects.

Each of the Defendants was billed for the shipments at the negotiated rate, and each Defendant paid the Debtor its original transportation charges with the exception that at trial CCE still owed the Debtor $4,804.55.

Although each of the Defendants claimed it relied upon the Debtor to file the negotiated rates, the Court finds that such reliance was not reasonable as each of the defendants is a sophisticated shipper, who was dealing

with a sophisticated carrier. All of the parties knew the rules and regulations concerning tariff filings and yet they proceeded to conduct business as if there were no such requirements.

The Court further finds and concludes that even if the Defendants' reliances were to be considered reasonable, and facts were developed sufficient to constitute "fraud" on behalf of the Debtor, the Court finds that the "filed rate" doctrine precludes the assertion of "equitable defenses" such as detrimental reliance or fraud, and that the Plaintiffs are entitled to recover regardless of the conduct of the Debtor.

The Debtor has a tariff provision on file with the ICC which provides, effective June 16, 1985, that a late payment charge of 1.25% per month is to be applied to all freight bills which

are not paid within fifteen (15) days of delivery. This tariff also provides that the Debtor is entitled to reimbursement of reasonable attorney's fees in the amount of 33% of the transportation charges and the late payment charges should payment not be made within thirty (30) days of presentation of freight bills. The Court finds that this tariff provision is applicable only with respect to the original accounts receivable owed by CCE. The Court will not approve attorney's fees or interest on any of the undercharged amounts.

Discussion and Conclusions of Law

These matters arise from Title 11 (11 U.S.C. Sections 101, et seq.) and were properly called for trial before this Court on January 16, 1988, after notice to all parties, and this Court had jurisdiction over these adversary

proceedings pursuant to 28 U.S.C. Section 1334, said proceedings having been properly referred by this Court pursuant to 28 U.S.C. Section 157(a). Furthermore, this Court finds that these adversary proceedings are related to the case under Title 11 and are properly before this Court pursuant to 28 U.S.C. Section 157(c).

At pre-trial conferences, the Court asked the parties whether they desired to have these proceedings handled as dispositive matters or subject to de novo review by the District Court as provided in 28 U.S.C. Section 157(c). The Court notes from the record in these proceedings that all parties agreed to have the Court issue dispositive rulings pursuant to 28 U.S.C. Section 157(c)(2).

Since There Is No Written Bilateral Contract Between the Debtor and Each

of the Defendants, As A Matter of Law There Can Be No Contract Carriage Relationship Between the Parties.

It is well settled that a carrier can operate both as a common and contract carrier. **Regular Common Carrier Conference v. United States**, 803 F.2d 1186, 1189 (D.C. Cir. 1986). A motor common carrier is defined by the Interstate Commerce Act as "a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. Section 10102(14). In contrast, a motor contract carrier is defined as:

> a person providing motor vehicle transportation of property for compensation under **continuing agreements** with one or more persons --(i) by assigning motor vehicles for a continuing period of time for the **exclusive** use of each such person; or

(ii) designed to meet the **distinct needs** of each such person. (Emphasis supplied).

49 U.S.C. Section 10102(15)(B).

"Continuing agreements" is defined in the Code of Federal Regulations as meaning a **written, bilateral** agreement. 49 C.F.R. Section 1053.1. This regulation provides in pertinent part that no contract carrier shall transport property for hire in interstate or foreign commerce.

> ...except under special and individual contracts or agreements which shall be in **writing**, shall provide for transportation for a particular shipper or shippers, shall be **bilateral** and impose specific obligations upon **both** carrier and shipper or shippers, shall cover a **series of shipments** during a **stated period of time** in contrast to contracts of carriage governing individual shipments,...(Emphasis supplied).

Each Defendant has stipulated that it failed to execute a written, bilateral contract, imposing specific obligations

on both itself and the Debtor and covering a series of shipments. (Stip. Nos. 23, 37, 57 and 63). Instead, the Defendants claim to have relied upon the Debtor's oral quotations, or in some instances, written quotations and the original freight bills, to "confirm" the belief that a contract was created. As indicated in the regulation, a "contract" limited to the freight bills and bills of lading is specifically excluded from the definition of contract carriage. Also, a quotation letter, or other written offer is precluded as not "bilateral," and not imposing specific obligations upon the shippers.

Besides failing to comply with the spirit and intent of the ICC Regulations governing contract carriage, the Defendants and the Debtor failed to comply with the pre-

conditions outlined in the Debtor's contract carriage permit (attached as Exhibit "B" to the Stipulated Facts). On the face of the Permit it is clearly stated: "this authority will be effective as long as the carrier maintains compliance with the requirements pertaining to ... the execution of contracts (49 C.F.R. 1053)." The Permit further states "while the execution of contracts must be accomplished, it is unnecessary to file them with the Commission." (Emphasis supplied). The Defendants admit in the Stipulation of facts that there are no "executed" contracts governing the involved transportation.

A further analysis of each of the Defendants' contract carriage claim reveals the weakness of their arguments. CCE bases its contract carriage claim on the oral

representations of the Debtor (i.e., rate quotes) and one letter written by the Debtor's Director of Sales (Exhibit "D" to the Stipulated Facts). The letter makes no mention that the Debtor seeks to handle CCE's freight as a contract carrier, nor does the letter contain a promise on behalf of CCE to tender the Debtor, even a single shipment of freight. The letter also fails to indicate that the Debtor will provide CCE with any specialized service, or dedication of equipment as is required by the statutory definition of contract carriage. 49 U.S.C. Section 10102(15).

Similarly, Defendant Reiter relies solely upon a rate quotation letter of the Debtor (letter attached as Exhibit "E" to the Stipulated Facts). In this letter, the Debtor's Director of Operations refers to the Debtor's

operating certificate (i.e. common carrier certificate). He does not mention that the Debtor had contract carrier authority (which it did not obtain until 77 days after this letter was written) or that a copy of the contract carriage permit was enclosed with the letter. Also, the letter implies that the Debtor will be charging Defendant Reiter a rate which is not contained in its tariffs. Reiter stipulated that it was aware that the law and ICC regulations required the Debtor to change its tariff rates. (Stip. No. 30). The fact that Reiter chose not to obtain copies of the Debtor's rates prior to engaging the Debtor indicates that its reliance upon the Debtor to file the negotiated rates was not reasonable. Also, the letter does not indicate that the Debtor will provide Reiter with any specialized service or dedication of equipment.

In **West Coast Truck Liners, Inc. v. Kaiser Aluminum and Chemical Co.**, 1987 Fed. Carr. Cas. (CCH) para. 83,336 (N.D. Cal. 1987), the District Court explained the need for a written contract for carriage to apply:

> A 'continuing agreement' has been interpreted to mean a written bilateral agreement 49 C.F.R. Section 1053.1 (1982). Under the oral agreement West Coast was providing its services as a motor common carrier while under the transportation agreement, West Coast acted as a motor contract carrier. Id., at p. 58,487.

In **West Coast** the Court found that although the Plaintiff motor carrier had both common and contract carriage authority so long as it was handling goods pursuant to, "an oral agreement; it was acting as a 'motor common carrier,' not as 'motor contract carrier.' See 49 C.F.R. Section 1053.1. Therefore, the filed rate doctrine applies." Id. at p. 58,488.

The facts here just do not fit contract carriage. It is a pure and simple matter of common carriage and the Defendants' arguments for the finding of a contract carriage arrangement between the parties must fail.

The Defendants' Characterization of Plaintiffs' Actions For Freight Undercharges Pursuant to Properly Filed Tariffs As An Unreasonable Practice Contravenes Clear Legal Precedent

The United States Supreme Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In **Louisville & N.R.R. v. Maxwell**, 237 U.S. 94, 97 (1915) the Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. (Emphasis supplied).

In **Armour Packing Co. v. U.S.**, 209 U.S. 56, 81 (1908), the Court explained the rationale for the rigid rule of the filed rate doctrine:

> If the rates (filed and published as required by law) are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

The Supreme Court has applied this rule of law every time it has addressed the issue of adherence to lawful common carrier rates. See, e.g., **Thurston Motor Lines v. Jordan K. Rand, Ltd.**, 460 U.S. 533, 534-35 (1983) (carrier has absolute right to collect tariff charges on every shipment); **Southern Pacific Transportation Co. v.**

Commercial Metals Co., 456 U.S. 336, 343-44 (1982)(equitable defense of carrier's violation of ICC credit regulations rejected); **Baldwin v. Scott County Milling Co.**, 307 U.S. 478, 484-85 (1939); **Louisville & N.R.R. v. Central Iron & Coal**, 265 U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interstate commerce); and **Louisville & N.R.R. v. Rice**, 247 U.S. 201, 202 (1918) (where the Court stated that a carrier's claim is, of necessity, predicated on the tariff -- not an understanding with the shipper).

The U.S. Courts of Appeal have also consistently applied the "filed rate doctrine". See **Inman Freight Systems, Inc. v. Olin Corp.**, 807 F.2d 117 (8th Cir. 1986) (estoppel defense of detrimental reliance rejected as

deviation from filed rate is not permitted under any pretext); **Farley Transportation Co. v. Santa Fe Trail Transportation Co.**, 778 F.2d 1365, 1372 (9th Cir. 1985) (penalty provisions in a tariff which provided for charges ten times the normal rate upheld despite carrier's failure to reveal its existence to the shipper); **Louisville & N.R.R. v. Mead Johnson & Co.**, 737 F.2d 683 (7th Cir. 1984) (misquotation of rate held not a bar to later recovery of correct rate); **Fry Trucking Co. v. Shenandoah Quarry, Inc.**, 628 F.2d 1360, 1363 (D.C. Cir. 1980) (carrier awarded difference between agreed upon "contract rates" and published rates); **Illinois Central Gulf Railroad Company v. Golden Triangle Wholesale Gas Company**, 586 F.2d 588, 592 (5th Cir. 1978) (estoppel defense rejected, storage charges in tariff applied

despite repeated assurances by carrier that they would not apply); **Nyad Motor Freight, Inc. v. W.T. Grant Co.**, 486 F.2d 1112, 1114 (2d Cir. 1973) (filed rate applied despite non-filed contract of parties to apply lower rate); **Chicago V & R Co. v. Ready Mix Concrete Co.**, 487 F.2d 1263, 1267 (8th Cir. 1973); **Bower & Campbell v. Knox Glass, Inc.**, 390 F.2d 193, 196 (3d Cir. 1968); and **Norfolk & Western R. Co. v. American Comp. St. Corp.**, 181 F.2d 183, 184 (6th Cir. 1950).

The "filed rate doctrine" is so absolute that a claim for relief from the filed rate cannot even be predicated on a carrier's alleged fraudulent or intentional misquotation of rates. **Consolidated Freightways Corp. v. Terry Truck, Inc.**, 612 F.2d 465 (9th Cir.), **cert. denied**, 447 U.S. 907 (1980) (counterclaim for fraud

dismissed); **Missouri Pacific R. Co. v. Rutledge Oil Co.**, 669 F.2d 557 (8th Cir. 1982) (IC Act precludes shippers from asserting estoppel defense of detrimental reliance); **Paulson v. Greyhound Lines, Inc.**, 628 F. Supp. 881 (D. Minn.), **aff'd**, 804 F.2d 506 (8th Cir. 1986) (fraudulent guarantee of next day delivery not grounds for damages as next day service not contained in tariff).

The ICC's Policy Statement in **Ex Parte No. MC-177 Is Without A Basis In Law And Has Been Rejected by Numerous Courts**

In the face of eight years of contrary judicial precedent, Defendants request this Court to rely upon **Ex Parte No. MC-117. National Industrial Transportation League -- Petition to Initiate Rulemaking on Negotiated Motor Common Carrier Rates**, 3 I.C.C. 2d 99

(1986), in an effort to establish equitable defenses to the requirements of 49 U.S.C. Section 10761(a). At the outset, it should be noted that this is a **non-binding policy statement** which is contrary to years of unwavering judicial statutory construction. The policy statement is inconsistent with the statutory mandate of 49 U.S.C. 10761(a) and is without a reasonable basis in law. Thus, the policy statement is not entitled to deference by this Court. Cf. **SEC v. Sloan**, 436 U.S. 103, 118-19 (1978); **FMC v. Seatrain Lines, Inc.**, 441 U.S. 726, 745 (1973); and **West Coast Truck Lines, Inc. v. Kaiser Aluminum & Chemical Co., supra.**

In **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Georgia-Pacific Corporation**, 1988 Fed. Carr. Cas. (CCH) para. 83,349 (D. Conn.

1987), Chief Judge Daly provided an excellent summation of the development and state of the law in this area. Therein, Chief Judge Daly concluded that Equitable defenses such as that here proffered by Defendants are "statutorily barred." Id., at p. 58,018. The Court found that adherence to the "filed rate doctrine" has been consistently required regardless of the defense sought to be interposed. Further, Chief Judge Daly noted that when Congress rewrote the statutes governing interstate motor carriers it neither explicitly nor implicitly amended the law requiring strict adherence to the filed rate doctrine. The Court also noted that while the ICC is **"free to change its policies, [it] is not free to change a clearly established rule of law."** Id., at p. 58,020.

In Cooper v. California Consolidated Enterprises, Inc. (In re: Carolina Motor Express, Inc.), Adversary Proceeding No. 86-0498 (Bkrtcy. W.D. NC March 25, 1987), this Court stated that Ex Parte No. MC-177:

> ...constitutes at most, an invitation for courts to refer unreasonable practice cases for analysis. The Commission readily admits that consistent with the statutory scheme, the Court retains its authority to set the remedy and accept or reject the Commission's conclusions. Ex parte No. MC-177, p. 8.

slip op., p. 2. See also, West Coast v. Kaiser, supra 1988 Fed. Carr. Cas. (CCH) at 58,488; Taynton Freight System, Inc. v. Tripar Transportation (In re: Taynton Freight System, Inc.), 1988 Fed. Carr. Cas. (CCH) para. 83,343 (Bkrtcy. M.D. Pa. 1987); Oneida Motor Freight, Inc. and Delta Traffic Service, Inc. v. Felsway Corporation (In re: Oneida Motor Freight, Inc.),

1988 Fed. Carr. Cas. (CCH) para. 83,346 (Bkrtcy. D. N.J. 1987).

In Tripar Transportation, supra, judge Thomas C. Gibbons, in denying a request to refer the freight undercharge issue to the ICC stated:

> ...Additionally, even if we were to refer certain issues to the ICC, the Bankruptcy Court retains its authority to set the remedy and accept or reject the ICC's conclusions. After reviewing the facts presented in this case, it is evident that this case does not involve issues reserved for the special competence of an administrative body, and that the Bankruptcy Court must ultimately be the arbiter of this case. Thus, we find that referral of this case to the ICC would involve an unnecessary delay in the resolution of this adversary proceeding.

Id., at p. 58,004.

The Court goes on to state, "we recognize the longstanding doctrine that equitable defenses are not available to shippers faced with uncharged collection actions brought by common carriers". (Citation omitted).

Id., at p. 58,004, n. 3.

Elevating a shipper's reliance on a quoted rate to a cognizable defense sharply departs from the law enacted by the legislature and consistently enforced by the judiciary. As noted by Judge Patel in **West Coast v. Kaiser**, **supra**, at p. 58,488:

> ...efforts to refer matters to the ICC must be reviewed in light of the fact that the ICC does not have the power to reject effective tariffs, **ICC v. American Trucking Ass'ns**, 467 U.S. 354, 363 (1984), reh'g denied, 468 U.S. 1224 (1984) nor the authority to order the waiver of undercharges, **NITL -- Petition to Institute Rulemaking**, 1986 Fed. Car. Cas. (CCH) para. 37,284, at 47,352.

When the alleged unreasonable practice involves a violation of a filed rate (not the reasonableness of the rate itself) the courts and not the ICC have exclusive jurisdiction to determine and apply the proper charge. **I.C.C. v. J.B. Montgomery, Inc.**, 483 F. Sup. 279 (D. Colo. 1980); **Farley v.**

Santa Fe, 778 F.2d at 1370-71.

In **J.B. Montgomery**, the ICC, on behalf of various shippers, sought restitution for past duplicate billings, or overcharges, in addition to prospective injunctive relief. The defendant argued that the cases should have been remanded to the ICC for agency proceedings on whether the defendant's practices were unreasonable and/or discriminatory. The court rejected the defendant's attempt to refer the case to the ICC stating:

> In this case, the primary issue is not the reasonableness of the rates as filed with the ICC, but whether the defendants have been operating in violation of those rates. While the former question clearly does involve the expertise of the ICC, the latter does not.

483 F. Supp. at 281

In **Farley**, the plaintiffs argued that Santa Fe's motion for summary judgment

on the issue of the filed rate doctrine should have been stayed pending referral of the matter to the ICC contending that the tariff which required Farley to pay a penalty of ten times the normal rate for failure to comply with an audit was unreasonable as applied to the facts of its case. Farley did not argue that the tariff provision was unreasonable on its face or that its language was not used in the ordinary sense. Rather, Farley sought referral based on the practice of applying the tariff in its particular case. The Ninth Circuit Court of Appeals rejected this argument finding that referral is not proper where the referring party admits the tariff is unambiguous and reasonable on its face. 778 F.2d at 1371.

In this proceeding the Defendants present no evidence that the involved

tariffs are in anyway confusing or "unreasonable on their face". Rather, each Defendant admits that the Debtor was required to charge pursuant to its "filed rates" and complains only that negotiated rates were not confirmed by a tariff filing. Since there is no dispute as to what are the correct rates, this Court is fully capable of reviewing the application of the involved rates and deciding the amount owed by each Defendant.

In **Civil Aeronautics Board v. Modern Air Transport**, 179 F. 2d 622 at 624 (2d Cir. 1950), the court held that the doctrine of primary jurisdiction:

> ...is not applicable where the issue regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule. Thus, it has been continuously asserted that the courts have original jurisdiction to interpret tariffs, rules and practices where the issue is one of violation, rather than reasonableness. (Emphasis supplied).

The case law is clear that when it comes to the practice of violating a published tariff rate, referral of the issue to the ICC is improper and any decision rendered by the ICC therefrom is considered a nonbinding advisory opinion. **Williams v. AT&T Technologies, Inc. (In re: Silverwheel Freightlines, Inc.)**, Adversary Proceeding No. 85-0743-S (Bkrtcy. D. OR Sept. 11, 1986), **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Pride Health Care Equipment**, Civil No. 87-0915 (M.D. PA Nov. 18, 1987), 1988 Fed. Carr. Cas. (CCH) para. 83,345 (1987).

As stipulated, both Defendants were aware of the obligation to pay the Debtor its filed tariff and without further thought acted as if there was no such obligation. Certainly, if the Defendants genuinely desired to deal with the Debtor as a contract carrier,

they should have been willing to sign written bilateral contracts with the Debtor. Alternatively, the Defendants could have verified the rates they desired to pay by requiring the Debtor provide a copy of its tariff to them prior to their tendering freight to the Debtor.

The Court in **West Coast** was faced with a similar argument raised by a shipper who had "negotiated" a rate with a motor carrier and was now seeking relief from the undercharge suit brought by the carrier. In response, Judge Patel stated:

> Here there is no evidence the shipper has sought relief directly, from the ICC nor did it institute its own action. Referral at this stage would encourage the shipper who has received the advantage of a lower rate to wait and see whether the carrier will attempt to recover the undercharge and only then assert his unreasonable practice claim. This flies in the face of the statute and its clear purpose.

Id., at p. 58,488-89.

Recent Court Decisions Affirm That The Motor Carrier Act of 1980 Did Not Change The Strict Requirements of the Filed Rate Doctrine

Although the ICC in **Ex Parte** No. MC-177 looks to the Motor Carrier Act of 1980 (P.L. 96-296, July 1, 1980), to justify "equitable" defenses, the 1980 Act did not change the strict requirements of 49 U.S.C. Section 10761(a). This was recently made clear by the Supreme Court in **Square D Co. v. Niagara Frontier Tariff Bureau**, -- U.S. --, 106 S. Ct. 1922 (1986).

In **Square D**, the Supreme Court revisited the filed rate doctrine in an anti-trust context and concluded that the 1980 Motor Carrier Act did not alter the statutory requirements and consequences. In that case, the Court

quoted with approval from **Koegh v. Chicago & Northwestern R. Co.**, 260 U.S. 156 (1922), thus:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carriers and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Square D. v. Niagara, -- U.S. --, 106 S. Ct. at 1927.

The ICC's policy statement attempts to distinguish Square D on the grounds that it merely holds that carriers must file rates and not that the ICC is precluded from declaring unreasonable the collection of the filed rate. **Ex Parte** No. MC-177, 3 I.C.C. 2d at 108. Such a conclusion is in direct opposition to that reached by the 8th Circuit in **Paulson v. Greyhound Lines**, supra, where the 8th Circuit affirmed a

district court decision that special agreements of the parties cannot, as a matter of law, alter the requirements of a published tariff. Significantly, the court in **Paulson** relied specifically on **Square D** in upholding the vitality of the filed rate doctrine. Additionally, the semantics used by the ICC are not persuasive. **Square D** states that the filed rate is the governing rate. Unless the rate itself is found unlawful, it must be collected. The requirements of Section 10761 are meaningless if the filed rate need not be collected. The filed rate doctrine mandates collection of a lawful tariff rate absent a finding that the rate is itself unlawful, and the ICC has no power to waive the Act's requirements.

In **R.C.C.C. v. U.S.**, 793 F.2d at 379 the D.C. Circuit found the ICC without

statutory authority to waive the requirements of 49 U.S.C. Section 10761(a) stating:

> That requirement [for a rate to be contained in a tariff] is utterly essential to the Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory, see 49 U.S.C. Sections 10701 and 10741(b) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, see 49 U.S.C. Sections 10708(a)(1) & 11701(a).

In **Motor Carrier Audit & Collection Co. v. United Food Service, Inc.**, 1987 Fed. Carr. Cas. (CCH) para 83,326 (D. Colo. 1987), the Court after a thorough recitation of the filed rate doctrine and an in-depth analysis of the Commission's decision in **Ex Parte No.** MC-177 concluded:

> As the ICC itself admits, 'the commission does not have jurisdiction over claims challenging the reasonableness of motor carrier rates

> charged in the past nor authority to order the waiver of undercharges.' Id. at 4. Rather, it can only provide the courts with an advisory opinion as to whether a shipper should be allowed to assert equitable defenses to a carrier's claim. **While the ICC may so advise a court, it is difficult to understand how, in the light of clear precedent establishing that equitable defenses are not generally available, a court could adopt the ICC's recommendation that a defendant be allowed to assert those defenses.** (Emphasis supplied.)

Id. at p. 58,434.

The Court in **Motor Carrier Audit** readily distinguished **Seaboard System R.R. v. U.S.**, 994 F.2d 635 (11th Cir. 1986) the case most heavily relied upon by the ICC in Ex Parte MC-177, as dealing with a confusing tariff and limited to those cases where the ICC had original jurisdiction over the case (i.e., where an administrative complaint was filed with the ICC). Moreover, the **Seaboard System** case was a railroad case wherein the ICC has

jurisdiction to award monetary reparations. In motor carrier cases, however, the ICC does not have jurisdiction to order the waiver of undercharges or award reparations. See 49 U.S.C. 11706(c)(2).

There have been numerous other recent U.S. District Court decisions denying defendants' motions to refer their cases to the ICC because the ICC is not capable of rendering a legally binding decision allowing the waiver of undercharges. See **Feldspar Trucking Company, Inc. v. Greater Atlanta Shipper, Inc.**, 1988 Fed. Carr. Cas. (CCH) para. 83,350 (N.D. Ga. 1987); **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Cuisinarts, Inc.**, C.A. No. H-87-424 (AHN) (D. Conn. Oct. 28, 1987); **Delta Traffic Service Service Inc. amd Oneida Motor Freight, Inc. v. Personality Plastics, Inc.**, C.A. No.

CV-87-2323 (E.D. N.Y. Oct. 7, 1987); **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Keystone Lighting Corporation**, C.A. No. 87-3659 (E.D. PA Sept. 24, 1987); and **Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Occidental Chemical Corporation**, C.A. No. 87-4217 (E.D. PA August 18, 1987).

Other Courts have also determined that referral to the ICC in cases raising similar "equitable" defenses to freight undercharge actions would be inappropriate and recognized that the filed rate doctrine cannot be overruled by the ICC. **Motor Carrier Audit and Collection Co. v. Medline Industries, Inc.**, Case No. 87-C-6123 (N.D. Ill. Nov. 2, 1987) (declaring **Ex Parte No. MC-177** to be inconsistent with the statute and precedents that bind the Court, and that any equitable defense

that the ICC might recognize cannot take precedence over the filed rate); and **Motor Carrier Audit and Collection Co. v. Casio**, Case No. 87-C-6124 (N.D., Ill. Oct. 27, 1987).

Finally, the Court in **Robert Yaquinto, Jr., Trustee, for Caravan Refrigerated Cargo, Inc. v. Supreme Beef Processors, Inc.**, C.A. 3-87-2274-R (N.D. TX Jan. 20, 1988), in entering summary judgment in favor of the Trustee against a shipper's claim for equitable relief stated:

> First, MC-177 is merely an advisory opinion and as such provides no precedential value. **Pacific Gas & Electric Co. v. F.P.C.**, 506 F.2d 33 (D.C. Cir. 1974). Second, and more fundamentally, an administrative agency cannot overrule the statutory requirements to publish and charge rates as set forth in tariffs. Congress was fully cognizant of the well established interpretation of Section 10761 when it enacted the Motor Carrier Act of 1980, and yet Congress choose not to amend that section.

Id., slip op. at 6.

The Court concluded that:

> Defendant is charged with notice of the properly filed tariffs. Consequently, its arguments of ignorance is unavailing. For this Court to excuse Defendant from compliance with Section 10761 it would be emasculating that section's ability to prevent discriminatory allowances by carriers.

Id.

Conclusion

Courts at the trial level should be very slow to change policy within the framework set out by Congress, and as delineated by the Supreme Court. This is particularly true where such changes could have been easily affected by an Act of Congress in 1980 when Congress was amending the motor carrier portion of the Interstate Commerce Act. However, Congress refused to alter the strict tariff requirements of the Act. Thus, the Court must, without regard to what its opinion is as to what the law

should be, rule with regard to what the law is. And that is, that the "filed rate" doctrine is still the law of the land, and that, without regard to the ingeniousness of the defenses, the Court cannot allow them as they are not allowed by law.

Therefore, the Court finds that the defense of contract carriage is non-existent and reliance by the Defendants on the negotiated rate was not reasonable, and even if it had been found to be reasonable that the "filed rate" doctrine is still the law of the land and that the Plaintiffs should recover judgment in accordance with their actions on matters of the undercharges in the amount of $58,793.03 owed by CCE, and $13,795.73 owed by Reiter.

As to the Defendant that owes accounts receivable not relating to

undercharges, the Court finds in the case of CCE that $4,804.55 is owed and renders judgment on that amount.

As to the subject of attorney's fees and interest, the Court will not approve any attorney's fees or interest on any of the undercharge cases, as the conduct of the parties in this case is such that each should bear its own costs. Interest of course as to the undercharges shall bear the statutory rate of interest from date of the judgment until paid, but not any interest prior thereto. As to the accounts receivable of $4,804.55 with regard to CCE, the Court finds that the tariff provisions with regard to interest and attorney's fees should apply and it is so ordered.

An appropriate judgment reflecting all the above shall be entered.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 89-1662

DELTA TRAFFIC SERVICE, INC., ET AL.,
Plaintiffs, Appellees,

v.

TRANSTOP, INCORPORATED,
Defendant, Appellant.

JUDGMENT

Entered: April 13, 1990

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, asnd was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to the district court with instructions to stay proceedings in this case and to refer it to the Interstate Commerce Commission in accordance with the opinion filed this date.

Costs to appellant.

By the Court:

[illegible]; P. [illegible]
Clerk.

[cc: Messrs: Gallagher. Augello. Steinfeld and Burk]

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No. 91-1496

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN RE: CAROLINA MOTOR EXPRESS, INC., DEBTOR

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1496

IN RE: CAROLINA MOTOR EXPRESS, INC., DEBTOR

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Langdon M. Cooper, Trustee for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc., hereby request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit by Petitioners Peter C. Reiter and California Consolidated Enterprises, Inc. in March, 1992 be denied.

STATUTES INVOLVED

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. Section 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of the rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 10762(a)(1) of the Interstate Commerce Act, 49 U.S.C. Section 10762(a)(1) provides:

> A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices relate to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C. Section 10701(a) provides that:

> A rate, classification, rule or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.

Section 11705 of the Interstate Commerce Act, 49 U.S.C. Section 11705 provides that:

> (a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.
>
> (b)(1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] or a freight forwarder is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title [49 USCS §§ 10761 et seq.].
>
> (2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.] is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.
>
> (3) A common carrier providing transportation or service subject to the jurisdiction of the Commis-

sion under subchapter II or IV of chapter 105 of this title [49 USCS §§ 1052] et seq. or 10561 et seq.] or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c) (1) A person may file a complaint with the Commission under section 10701(b) of this title [49 USCS §§ 10521 et seq. or 10561 et seq.] or bring a civil action under subsection (b) (1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.]: A person may begin a proceeding under section 10704 or 10705 of this title [49 USCS § 10704 or 10705] to enforce liability under subsection (b) (3) of this section by filing a complaint with the Commission under section 11701(b) of this title [49 USCS § 11701(b)].

(2) When the Commission makes an award under subsection (b) of this section, the Commission shall order the carrier to pay the amount awarded by a specific date. The Commission shall order the carrier to pay the amount awarded by a specific date. The Commission may order a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.] to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Commission requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier does not pay the amount awarded by the date payment was ordered to be made.

(d) (1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Commission requiring the payment of damages by a common carrier providing transportation sub-

ject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.], the text of the order of the Commission must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The finddings and order of the Commission are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district (A) in which the plaintiff resides, (B) in which the principal operating office of the carrier is located, (C) if a rail carrier, through which the railroad line of that carrier ruins, or (D) or if a water carrier, in which a port of call on a route operated by that carrier is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as part of the costs of the action.

STATEMENT OF THE CASE

Petitioner California Consolidated Enterprises, Inc. (hereinafter "CCE") is a broker of motor carrier transportation. It arranges transportation services of motor carriers operating under the authority of the Interstate Commerce Act (hereinafter the "Act"), 49 U.S.C. Section 10101 et seq. ((1982), for the shipping public. It provides these services pursuant to a license issued to it by the Interstate Commerce Commission (hereinafter "ICC" or "Commission") . CCE tendered traffic to Carolina Motor Express, Inc. (hereinafter "CMX") for transportation in interstate commerce.

Petitioner Peter Reiter is similarly a broker of motor carrier transportation, licensed by the Commission to perform these services. Peter Reiter also tendered traffic to CMX for transportation in interstate commerce.

The bankruptcy proceedings which have lead to this dispute, commenced with the filing of a petition under Chapter 11 by CMX a motor common carrier. This was later converted to a petition for relief under Chapter 7 of the United States Bankruptcy Code. Langdon M. Cooper was appointed Trustee (hereinafter "Trustee") of the estate while the proceedings were still under Chapter 11. As a motor common carrier, CMX had a tariff on file with the Commission. The tariff at issue here contained a provision, effective June 16, 1985, which provided that the carrier could collect a late payment charge of 1.25% per month on all freight bills which were not paid within 15 days of the delivery of that shipment. The tariff also contained a provision that the carrier was entitled to collect attorney's fees in an amount computed at 33% of the transportation and late payment charges, if it became necessary for the carrier to turn the account over to an attorney for collection. Plaintiff, Mark & Associates of North Carolina (hereinafter "Mark & Associates"), is a rate auditing company hired by the Trustee, pursuant to Court order, to audit the carrier's freight bills. Mark

& Associates audited the freight bills for shipments transported by CMX for Petitioners. The audit for CCE's shipments revealed freight undercharges in the amount of $58,793.03. The audit for Peter Reiter revealed freight undercharges in the amount of $13,795.73. The Trustee and Mark & Associates brought actions to collect these amounts in the bankruptcy court.

The bankruptcy court entered a final judgment for the Trustee and Mark & Associates, concluding that because the filed rate doctrine precluded Petitioners' assertion of equitable defenses to the carrier's undercharge claims, the carrier was entitled to recover regardless of its own actions. *See Cooper v. California Consolidated Enterprises*, 84 B.R. 979 (Bankr. W.D.N.C. 1988). On appeal, the district court reversed the final judgments of the bankruptcy court and referred to the ICC the question of whether the carrier's collection of undercharges would amount to an unreasonable practice. Respondents appealed the district court decision.

The Fourth Circuit vacated the district court's reversal of the bankruptcy court's judgment, remanded these cases to the district court with instructions that the judgment of the bankruptcy court be reinstated. Petitioners initially filed a Petition for Writ of Certiorari on February 4, 1992, however that petition was rejected by this Court and Petitioners refiled on March 16, 1992. Respondents opposition is thus timely filed. Petitioners, in their writ, claim the Fourth Circuit should have remanded the case back to the Commission for a determination of the reasonableness of CMX's rates prior to ordering Petitioners to pay CMX's filed rates.

REASONS WHY WRIT SHOULD BE DENIED

This matter presents a simple, straight forward undercharge action. Pursuant to the judgment of the bankruptcy court as affirmed and modified by the Fourth Circuit, the Trustee and Mark & Associates are entitled to

recover the undercharges. The statutes mandate that a common carrier charge and collect the filed tariff. This well established doctrine has been historically referred to as the "filed rate doctrine." This Court reiterated the importance of this doctrine in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915) and its progeny, including the most recent affirmance of that doctrine in *Maislin Industries, U.S., Inc. et al. v. Primary Steel, Inc.*, 497 U.S. ——, 111 L.Ed. 2d 94, 110 S.Ct. 2759 (1990) ("Maislin"). This Court has never altered its view that the filed rate doctrine governs the legal relationship between common carriers and shippers. The filed rate doctrine compels a common carrier to collect and shippers to pay the carrier's filed rates. 111 L.Ed. 2d at 109. Likewise, the statutory foundation for the filed rate doctrine has never been changed. *Id.* at 111. The Fourth Circuit recognized that essential for the statutory purpose to remain intact is for the shipper to pay the filed rate first and then seek reparations.

Petitioners rely upon Supreme Court Rule 17(a) in seeking certiorari. Petitioners assert that there is a conflict among the circuits based upon contrary decisions in *Delta Traffic Service, Inc. et al. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990); *Duffy v. BMC Industries, Inc.*, 938 F.2d 353 (2d Cir. 1991); *Orr v. Interstate Commerce Commission*, 912 F.2d 119 (6th Cir. 1990); *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982). Petitioners also assert an inconsistency with this Court's ruling in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956).

Respondents recognize that the circuits are not in accord with respect to the rate reasonableness issue. However, the Supreme Court precedent is clear. A shipper must first pay the filed rate and then sue for reparations. Moreover, this Court's ruling in *Western Pacific* provides little assistance to Petitioners as *Western Pacific* involved a claim by the U.S. Government, which has always been

accorded an exception to the filed rate. *See* 49 U.S.C. Section 66. Also, *Western Pacific* turned on a technical issue, as the specific commodity being shipped was not listed in any tariff. Thus, the technical expertise of the ICC was required to analyze the reasonableness of two filed rates in order to determine which commodity rate should apply to those shipments.

Although there exists a conflict among the circuits, it is believed that the Fourth Circuit has properly interpreted Supreme Court law and certiorari should be denied.

SUMMARY OF ARGUMENT

This matter raises a simple issue, does the Interstate Commerce Act allow a shipper, who refuses to pay a motor carrier's filed rate, to argue that the rate is unreasonable, delay paying for years, and thereby disrupting the flow of commerce. This Court in *Arizona Grocery Co. v. Atchison T. & S.F.R. Co.*, 284 U.S. 370 (1932) and the Fifth Circuit in *Supreme Beef Processors, Inc. v. Yanquinto*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 3254 (1990), understood the constraints of the statute—pay the filed rate and then challenge the reasonableness of the rate through a reparations action. The Fourth Circuit, cognizant of the statutory scheme, agrees with this Court and the Fifth Circuit. *See In re Carolina Motor Express, Inc.*, 949 F.2d 107 (4th Cir. 1991).

ARGUMENT

I. PETITIONERS' POSITION WITH RESPECT TO A RATE REASONABLENESS CHALLENGE IS CONTRARY TO SUPREME COURT PRECEDENT

Petitioners assert that this Court in *Maislin* reasserted that a shipper may assert a defense of rate reasonableness against a carrier seeking to collect its tariff rate. However, this Court has historically taken a different approach than the one suggested by Petitioners. In *Maislin*, the Court, citing the precedent in *Keogh v. Chicago &*

Northwestern R. Co., 260 U.S. 156, 163, 67 L.Ed. 183, 43 S.Ct. 47 (1922) explained:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and *until suspended or set aside,* this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.

111 L.Ed. 2d at 108 (citations omitted and emphasis supplied). The Court also cited with approval from *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932), reaffirmed that the filed rate is the legal rate, however, the Interstate Commerce Act:

> did not abrogate, but [rather] expressly affirmed, the common-law duty to charge no more than a reasonable rate . . . . In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under [the Act] the shipper was *bound to pay* the legal rate; but if he could show that it was unreasonable he might recover reparation.
>
> The Act altered the commor law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts.

111 L.Ed. 2d at 110 (citation omitted and emphasis supplied). Thus courts are not free to allow shippers to litigate the issue of rate reasonableness while preventing the collection of the filed rate. The statute is clear, a shipper (other than the U.S.) must pay the filed rate and then seek reparations from the Commission.

II. IN FINDING RATE REASONABLENESS MAY BE PLED DEFENSIVELY CIRCUITS HAVE MISAPPLIED SUPREME COURT PRECEDENT.

Petitioners offer the opinions rendered by the First Circuit in *Transtop*; the Second Circuit in *BMC*; the Sixth Circuit in *Orr*; and the Seventh Circuit in *Western Transp.*; as cases allowing rate reasonableness to be a defense pled and opposite to the instant case. Respondents counter with the decision of the Court below and Fifth Circuit in *Supreme Beef*, coupled with Supreme Court precedent. A comparison of the cases reveals that *Transtop* had to be modified following *Maislin* because the First Circuit incorrectly read the statute and referred the unreasonable practice defense raised, the Fifth Circuit had no such problem as it interpreted the statute properly.

In *BMC* the Second Circuit was concerned with the status of the bankrupt carrier and the inability of the undercharged shipper to recover full value if the shipper was awarded reparations after paying the filed rate. This issue is dealt with by the Fourth Circuit in a substantive footnote. 949 F. 2d at 111-112 n.4. The Fourth Circuit readily acknowledged that the Bankruptcy Code adequately provides for this contingency. Likewise, the *Orr* case turned on a complicated statute of limitations issue which is not at issue in a bankruptcy case, as statutes of limitation are tolled for claimants upon the filing of the bankruptcy. *See* 11 U.S.C. Section 108(c). Finally, *Western Transp.*, is a case that deals with the unreasonable practices of a carrier not unreasonable rates.

In criticizing the Fifth Circuit decision in *Supreme Beef*, the First Circuit in *Transtop* completely misapplies the holding of this Court in *Burlington Northern, Inc. v. United States*, 459 U.S. 131 (1982). The First Circuit apparently believes *Burlington Northern* is limited somehow to efforts by "federal courts to enjoin the *future* application of rates the carrier had filed with the Interstate

Commerce Commission". *Transtop, Inc.*, 902 F.2d at 105 (emphasis in original). However, a full reading of *Burlington Northern* and cases upon which *Burlington Northern* relied is not so limited.

For example in *Burlington Northern*, the Court stated:

> Again, we noted that Congress channeled *all rate decisions* to the Commission in the first instance, that court-ordered relief interferes with the delicate balance the Act strikes between the competing interests of shipper and carrier, and that the equities favor allowing the railroads to charge more than the Commission may ultimately find reasonable because the Act gives the shippers a right to reparations while no such protection is given to the carriers . . .

459 U.S. at 140 (citations omitted and emphasis supplied).

As noted in the above quote, because "all rate decisions" are relegated to ICC review, courts may not interfere with the ratemaking process by staying the collection of a filed tariff. *See Keogh, supra*, 260 U.S. at 163 ("*unless* and *until* suspended or set aside" the filed rate controls). There is no language limiting the proscription against court injunction of the collection of filed rates to those circumstances when the Commission is considering future rates as opposed to past rates. The referring circuits have created a fiction which is not supported by the statute or Supreme Court law in an effort to bend over backwards to find relief for shippers presented with undercharge claims made by bankrupt cariers. It is important to note that when a carrier seeks to collect its filed tariff rate, neither the statute nor case law makes a distinction as to whether or not the carrier is solvent. Shippers who ship with common carriers are charged with constructive knowledge of the carriers' filed rate. *See generally Maxwell, supra*. Should a shipper seek reparations the ability of a carrier to pay a reparations judgment has never been part of the statutory scheme. Also, a shipper that

receives a reparations award does have a claim for the full amount against the carrier's bankruptcy estate, thus giving said shipper the same rights as other trade creditors entitled to money from the estate.

The filed rate doctrine, itself, is based on the fundamental distinction between "legal rates" and "lawful rates". *See Arizona Grocery*, 284 U.S. at 384-87. A "legal rate" is simply a rate which is contained in a tariff duly published and filed with the Commission as required by 49 U.S.C. Section 10761(a). A "lawful rate" is a legal rate, i.e., a duly filed and published tariff rate, which, in addition, has been found by the Commission to be reasonable under 49 U.S.C. Section 10701(a) and 10701(e), and otherwise in accordance with the requirements of the Interstate Commerce Act.

As this Court has stressed on numerous occasions, a shipper is obliged to pay the *legal rate* of a carrier even though these rates have not yet been established to be *lawful rates*. "The statute requires rigid observance of the tariff without regard to the inherent lawfulness of the rates specified." *Davis v. Portland Seed Co.*, 264 U.S. 403,425 (1924). Thus, if a shipper believes that a rate is unreasonable, i.e., is unlawful, its remedy is not to exercise self-help by refusing to pay the tariff rate as it does in this case, but is instead relegated to filing a complaint with the Commission seeking reparations. As the Supreme Court stated in *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184,197 (1913):

> The tariff, so long as it was of force, was, in this respect to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

While the First Circuit cites *International Coal Mining* for the proposition that the shipper is entitled to

bring a suit against the carrier for reparation, (*See Transtop, Inc.*, 902 F.2d at 104), it completely ignores the above language, as well as the language from *Arizona Grocery* which clearly states that despite allegations of rate reasonableness, a shipper is "bound to pay" the filed rate of a carrier.

The principle of pay now and sue for reparations later was also approved by this Court in *Crancer v. Lowden*, 315 U.S. 631 (1942). In *Crancer*, the carrier brought suit to recover freight charges from the shipper. The case was tried without a jury and judgment was rendered in favor of the carrier. On appeal, the shipper argued that the district court erred in refusing to stay the action to collect the freight bills while the shipper sought a determination from the ICC as to whether or not the rates sought to be collected were "unjusted and unreasonable". This Court affirmed the decision below stating:

> . . . The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. *It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them* 'Until changed, tariffs bind both carriers and shippers with the force of law . . .'

315 U.S. at 635 (emphasis supplied).

This Court further explained the problems associated with a stay for purely reasonableness determinations:

> . . . If the trial judge had in the exercise of his discretion continued the trial of the cause until such time as the Commission had passed upon the reasonableness of the rate, the delay might have made it impossible for the carrier to produce the witnesses who had made the inspection of the shipments. On the other hand, the petitioners suffered no hardship as a result of the trial court's insistence on proceeding with the trial. If petitioners pay the judgment in this case and the Commission should in the still pending proceeding decide to modify the tariffs, petitioners can obtain a complete remedy by way of reparation.

315 U.S. at 636.[1]

While Petitioners might respond that after paying the legal rate, any action for reparations might result in a money judgment which would be paid at only a fraction of its value through the bankruptcy proceeding, this still does not mean it has not obtained "a complete remedy." Certainly, any other shipper who has paid the filed tariff charges of a carrier who later seeks reparations also runs the risk of the carrier ultimately filing bankruptcy prior to the collection of any reparations awarded.

Shippers have two statutory protections against the imposition of unreasonable rates by motor carriers. First, shippers have notice of the filing of rates and have had the opportunity to protest those rates prior to their effectiveness; thus, they are protected with regard to claims of rate reasonableness. *See* 49 U.S.C. Section 10708. The second remedy—"reparations" pursuant to 49 U.S.C. Section 11705(b)(3) —is more limited and cannot be used as a shield to prevent the collection of legal rates.

Indeed, pursuant to Congressional authorization, the Commission has promulgated regulations which strictly limit the extension of credit and require collection of the tariff rate within, at most, thirty days. *See* 49 C.F.R. Section 1320. The novel concept suggested by the referring circuits and Petitioners—that the tariff rate need not be paid as long as a rate reasonableness proceeding is pending before the Commission—threatens the integ-

---

[1] It should be noted that *Crancer* was cited by this Court with approval in *Western Pacific* and thus remains good law today. *See BMC*, 938 F.2d at 357.

rity of the tariff system and the filed rate doctrine. So long as the court's function is limited to enforcing the terms of a tariff, then all disputes over reasonableness will be commenced only before the ICC. However, if courts selectively enforce tariffs based on equitable considerations (i.e. it is not fair to allow the collection of a rate before testing its reasonableness), then the temptation to involve courts in disputes over rate reasonableness becomes much greater.

CONCLUSION

Section 10761(a) is, from a statutory and *stare decisis* standpoint, a crucial element of our national transportation policy. It enables shippers and carriers to move freight at specific rates in a fashion that not only gives notice to all but forms the foundation of our transportation policy, anti-discrimination. The Fourth Circuit has affirmed the pre-eminence of that statutory provision and this Court should deny this petition for certiorari.

Respectfully submitted,

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April 15, 1992

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Counsel for Respondents

* Counsel of Record

Supreme Court, U.S.
FILED
JUL 16 1992

No. 91-1496

In The

Supreme Court of the United States

October Term, 1992

IN RE: CALIFORNIA MOTOR EXPRESS, INC., DEBTOR

PETER C. REITER AND CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC. MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed February 4, 1992
Writ Of Certiorari Granted On May 18, 1992

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OR CALL COLLECT (402) 342-2831

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UNITED STATES BANKRUPTCY COURT
PROCEEDING DOCKET

COOPER, Langdon M., Trustee for
CAROLINA MOTOR EXPRESS, INC.

MARK & ASSOCIATES OF
NORTH CAROLINA, INC.

Plaintiffs

v.

CALIFORNIA CONSOLIDATED
ENTERPRISES, INC.

Defendants

Collection of unpaid freight bills for freight being transported in interstate commerce pursuant to 49 USC §10741(a), 10761 and 10762

Joseph L. Steinfeld, Jr.
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202-842-1741

Stuart R. Childs
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(704) 377-2086

Langdon M. Cooper
P.O. Box 488
Gastonia, NC 28053

1986		
12/18	1	COMPLAINT/ccc
1987		
1/20	5	ANSWER & Cert. of Service/ rm
1/20	6	MOTION of Deft. that the court permit them to file appropriate pleadings with the Interstate

Commerce Commission, Washington DC for a determination as to whether the charges that are being asserted against the Deft. constitute a reasonable practice/ rm

03/10 9 OPPOSITION
of Pltf. to Deft's motion for referral to Interstate Commerce Commission/ rm

03/20 10 REPLY
of Pltf. to Deft's memorandum of law filed in support of Deft's motion for referral to the Interstate Commerce Commission / rm

03/25 13. ORDER
denying deft's motion for referral to Interstate Commerce Commission. J.E.O. 3-25-87. JUDGMENT BOOK 14, #92 cc: Steinfeld, Cooper, Childs/ rm

03/30 16. MEMORANDUM
of Law of Deft., Carolina Consolidated Enterprises, Inc., in support of the deft's motion for referral to the Interstate Commerce Commission. Cert. of Service/ rm

02/10/88 28. STIPULATED FACTS
of Pltf./ rw

03-17-88 33. FINDINGS OF FACT & CONCLUSIONS OF LAW
/rw (cc: Childs, Cooper, Steinfeld)

03-17-88 34. JUDGMENT
that the Pltf. have and recover from deft. the sum of $58,793.03 for unpaid balance due invoices, plus post-judgment interest at the legal rate from the date of judgment. Pltf. shall also recover from deft.

the sum of $4,804.55 for unpaid original invoices, plus pre judgment interest of $1,423.35, and in addition Pltf. shall recov atty's fees of $2,055.21 for a total sum of $8,283.11 plus post-judgment interest at the rate of $2.00 per day. Pltfs. shall have and recover from Peter Reiter the sum of $13,795.73 for unpaid balance due invoices, plus post-judgment interest at the legal rate of interest. J.E.O. 3-17-88. JUDGMENT BOOK 15, #88. cc: Cooper, Steinfeld, Childs/ rw

03-28-88 35. NOTICE OF APPEAL
of deft. California Consolidated Enterprises, Inc. to final judgment entered on 3-17-88. Cert. of Service/ rw

04-07-88 36. NOTICE OF CROSS-APPEAL TO DISTRICT COURT
filed by Langdon Cooper, Trustee. Cert. of Service/ rw

04-07-88 37. STATEMENT OF ISSUES UPON APPEAL
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06-10-88 45. MOTION
of California Consoliated [sic] for a stay in the proceedings pending the decision in docket No. MC-C-30090, National Industrial Transportation League – Petition for Declaratory Order on Motion Common Carrier Negotiated Rates. Memorandum of Law. Cert. of Service/ rw

03/19/92 03/20/92	46.	MEMORANDUM of DECISION of United States Senior District Court Judge, Woodrow W. Jones/ rm
03/19/92 03/20/92	47.	JUDGMENT of United States Senior District Court Judge, Woodrow W. Jones that the judgment of the bankruptcy court is reinstated in accordance with the instruction of the Fourth Circuit Court of Appeals; Deft's motion to hold in abeyance Pltfs' motion for reinstatement of judgment and award of interest and atty's fees is DENIED; pltf's motion for entry of judgment and award of interest and atty's fees is granted; bankruptcy's court's denial of pltfs' request for late payment charges and attys' fees pursuant to ICC CAXN 101 Item 435 of the debtor's tariff is overruled; and, Judgment is granted in favor of pltfs in the principal amount of $58,793.03, late payment charges of $53,648.67, and attys fees in the amount of $37,443.07, for a total judgment of $149,884.77. Judgment Book #19, #96. Served in District Court/ rw

UNITED STATES BANKRUPTCY COURT
PROCEEDING DOCKET

COOPER, Langdon M., Trustee for
CAROLINA MOTOR EXPRESS, INC.

MARK & ASSOCIATES OF
NORTH CAROLINA, INC. Plaintiffs

v.

REITER, Peter C.

Defendants

Collection of unpaid freight bills for freight being transported in interstate commerce pursuant to 49 USC §s 10741(a), 10761 and 10762

Joseph L. Steinfeld, Jr.
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1987

01/29	1	COMPLAINT/ccc
02/27	5	ANSWER Cert. of Service/ rm
03/19	8	MEMORANDUM of Law of Deft., Peter C. Reiter, in support of the deft's motion for referral to the Interstate Commerce Commission. Cert. of Service/ rm
03/25	11	ORDER denying deft's motion for referral to Interstate Commerce Commission. J.E.O. 3-25-87. JUDGMENT BOOK 14, #93. cc: Childs, Steinfeld, Cooper/ rm

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02-11-88 26. TRIAL BRIEF
of Pltf./ rw

02-12-88 27. TRIAL BRIEF
of Deft./ rw (original in file #86-0498)/ rw

02-16-88 28. COURT TRIAL
Judgment for Pltf. - Steinfeld to draw proposed order - Childs & Gallagher have 7 days to respond/ rw

03-17-88 30. FINDINGS OF FACT & CONCLUSIONS OF LAW.
cc: Childs, Steinfeld, Cooper/ rw

03-17-88 31. JUDGMENT
03-17-88 that Pltfs' have and recover of deft., California Consolidated the sum of $58,793.03 for unpaid balance due invoices, plus post judgment interest at the legal rate from date of judgment; Pltf's shall also have & recover from California consolidated the sum of $4,804.55 for unpaid original invoices plus pre judgment interest of $1,423.35 and $2,055.21 representing atty's fees for a total sum of $8,283.11 plus post-judgment interest at the rate of $2.00 per day. Pltfs' shall have & recover from deft., Peter C. Reiter the sum of $13,795.73 for unpaid balance due invoices, plus post-judgment interest at the legal rate of interest. J.E.O. 3-17-88. JUDGMENT BOOK 15, #88.
cc: Steinfeld, Cooper, Childs/ rw

03-28-88 32. NOTICE OF APPEAL
of deft., Peter C. Reiter of final judgment entered on 3-17-88. Cert. of Service/ rw

04-07-88 33. NOTICE OF CROSS-APPEAL
filed by Langdon M. Cooper, Trustee. Cert. of Service/ rw

06-10-88 42. MOTION
of Peter C. Reiter for a stay in the proceedings pending the decision in Docket No. MC-C-30090, National Industrial Transportation League - Petition for Declaratory Order on Motor Common Carrier Negotiated Rates. Memorandum of Law. Cert. of Service/ rw

03/19/92 44. MEMORANDUM OF DECISION
03/20/92 of United States Senior District Judge, Woodrow W. Jones/ rw

03/19/92 45. JUDGMENT
03/20/92 of United States Senior District Judge, Woodrow W. Jones that the judgment of the Bankruptcy Court is reinstated in accordance with the instructions of the Fourth Circuit Court of Appeal Deft's Motion to Hold in Abeyance Pltfs' Motion for reinstatement of judgment and award of interest and Atty's fees is denied; Pltfs' motion for entry of judgment and award of interest and atty's fees is granted; the bankruptcy's court's denial of pltfs' request for late payment charges and attys' fees pursuant to ICC CAXN 101 Item 435 of the debtor's tariff is overruled, and, Judgment is granted in favor of pltfs in the principal amount of $13,795.73, late payment charges of $12,071.26 and attys fees in the amount

of $8,613.71 for a total judgment of $34,480.70. Served in district court. Judgment book #19, #94./ rw

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UNITED STATES DISTRICT COURT DOCKET

Cooper, Langdon M., Trustee for
Carolina Motor Express, Inc.

Mark & Associated of North Carolina Inc.

Plaintiffs

v.

Reiter, Peter C.

Defendants

Adversary Case #87-0028

Appeal to the district court from the bankruptcy court decision./CROSS APPEAL

BY: Joseph L. Steinfeld, Jr.
1275 K St., NW, #875
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202/ 842-1741

BY: Stuart R. Childs
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BY: Langdon M. Cooper
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704/ 864-6751
FOR: Carolina Motor Express, Inc.

1989

04-25 9 Memorandum of Decision. Copies mailed to Attys. of record.

04-25 10 JUDGMENT ORDERED that the judgment of the Bankruptcy Court in this cause be and the same is hereby reversed and the issue of whether under the facts of this case it would be an unreasonable practice for the deft. to be required to pay the undercharge claims advanced by the Pltfs. is referred to the Interstate Commerce Commission for consideration. IT IS FURTHER ORDERED that the Deft. take the necessary steps to bring this matter before the Interstate Commerce Commission within twenty-one (21) days of the filing date of this judgment, and the attorneys for the parties shall report to this Court the status of the case each three (3) months until the Commission renderes [sic] its decision. IT IS FURTHER ORDERED that further proceedings in this Court be stayed pending the decision of the Commission. Copies mailed to Attys. of record. (Order by W. W. Jones)
ORDER AND JUDGMENT DOCKET XXXXII, NO. 87.

UNITED STATES DISTRICT COURT DOCKET
SHELBY DIVISION

Cooper, Langdon M., Trustee for
Carolina Motor Express, Inc.

Mark & Associated of North Carolina Inc.

Plaintiffs

v.

California Consolidated Enterprises, Inc.

Defendants

Adversary Case #86-0498

Appeal to the district court from the bankruptcy court decision.

BY: Langdon M. Cooper
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704/ 864-6751
FOR: Carolina Motor Express, Inc.

BY: Robert J. Gallagher
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PH: 413-586-1994
&

BY: Joseph L. Steinfeld, Jr.
1275 K St., NW, #875
Washington, DC 20005
202/ 842-1741
FOR: Mark & Associated of NC, Inc.

BY: Stuart R. Childs
725 E. Trade St.
Charlotte, N.C. 28202
FOR: California Consolidated Enterprises, Inc.

1989

04-25 10 Memorandum of Decision. Copies mailed to Attys. of record.

04-25 11 JUDGMENT ORDERED that the judgment of the Bankruptcy Court in .this cause be and the same is hereby reversed

and the issue of whether under the facts of this case it would be an unreasonable practice for the deft. to be required to pay the undercharge claims advanced by the Pltfs. is referred to the Interstate Commerce Commission for consideration. IT IS FURTHER ORDERED that the Deft. take the necessary steps to bring this matter before the Interstate Commerce Commission within twenty-one (21) days of the filing date of this judgment, and the attorneys for the parties shall report to this Court the status of the case each three (3) months until the Commission renders its decision. IT IS FURTHER ORDERED that further proceedings in this Court be stayed pending the decision of the Commission. Copies mailed to Attys. of record. (rej) (Order by W. W. Jones)
ORDER AND JUDGMENT DOCKET XXXXII, NO. 86.

U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LANGDON M. COOPER, Trustee for
Carolina Motor Express, Inc.;
MARK & ASSOCIATES OF
NORTH CAROLINA, INC.

Plaintiffs-Appellants

v.

CALIFORNIA CONSOLIDATED
ENTERPRISES, INC.

Defendant-Appellee

7/27/90	Letter addressing effect of Supreme Court decision in Maislin Industries filed by Appellant Mark Associates NC in 89-3259, Appellant Langdon M. Cooper in 89-3261, Appellant Mark Associates NC in 89-3261, Appellant Langdon M. Cooper in 89-3261, Appellant Mark Associates NC in 89-3262, Appellant Langdon M. Cooper in 89-3262 [1387067-1] [89-3259, 89-3261, 89-3262] (dad) [89-3259 89-3261 89-3262]
7/27/90	Letter addressing Supreme Court decision in Maislin filed by Appellee Delaware Valley Ship in 89-3259 [1387074-1] [89-3259] (dad) [89-3259]
7/30/90	Letter filed by Appellee Peter C. Reiter in 89-3261, appellee California Cons addressing the Supreme Court's decision in Maislin Ind. v. Primary Steel, Inc. 89-3262 [1387913-1] [89-3261, 89-3262] (yj) [89-3261 89-3262]

U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LANGDON M. COOPER, Trustee for
Carolina Motor Express, Inc.;
MARK & ASSOCIATES OF
NORTH CAROLINA, INC.

Plaintiffs-Appellants

v.

PETER C. REITER

Defendant-Appellee

7/30/90	Letter filed by Appellee Peter C. Reiter in 89-3261, Appellee California Cons addressing the Supreme Court's decision in Maislin Ind. v. Primary Steel, Inc. 89-3262 [1387913-1] 89-3261, 89-3262] (yj) [89-3261 89-3262]

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

IN RE: CAROLINA MOTOR EXPRESS, INC. I.D. No.: 56-1299892	)	Case No. SH-B-86-00226 (Chapter 7)
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC. Plaintiffs, v. CALIFORNIA CONSOLIDATED ENTERPRISES, INC., Defendant.	)	Adversary Proceeding No. 86-0498 COMPLAINT to recover freight charges (Filed Dec. 18, 1986)

The Plaintiffs, Langdon M. Cooper, Trustee in bankruptcy for Carolina Motor Express, Inc., (hereinafter called "Trustee") and Mark & Associates of North Carolina, Inc. (hereinafter called "Mark") complaining of the Defendant, California Consolidated Enterprises, Inc., alleges and says that:

Parties and Jurisdiction

1. The Trustee, a resident of Gaston County, North Carolina is the duly appointed, qualified and currently serving Trustee of Carolina Motor Express, Inc., Debtor (hereinafter called the "Debtor) having been so appointed by this Court on November 7, 1986, an order for relief under Chapter 11 of Title 11 in the United States Bankruptcy Code (the "Code") having been entered by this Court on May 2, 1986, and approval of conversion of this case to a Petition for Relief under Chapter 7 having been approved by this Court on November 22, 1986.

2. Mark is a North Carolina corporation which was hired by the Debtor pursuant to a contract approved by this Court on July 15, 1986, to audit the Debtor's freight bills, and if the bills were found to be undercharged to rebill the same and collect the balance due charges. As part of said contract, Mark is authorized to commence litigation to collect the balance due invoices in the name of the Debtor and through counsel of its choice.

3. The Defendant, California Consolidated Enterprises, Inc. is a corporation organized under the laws of California with its principal place of business at 14704 Radburn Avenue, Santa Fe Springs, California 90670.

4. This is an adversary proceeding under Bankruptcy Rule 7001(1) related to the above-referenced bankruptcy case now pending before this Court, and in this adversary proceeding, the Plaintiffs seek to recover money owed by the Defendant to the Debtor for failure to fully pay for services rendered by the Debtor to the Defendant as is more particularly described below.

5. This Court has jurisdication [sic] over this action pursuant to 28 U.S.C. Section 1334 because this is a proceeding arising under Title 11 or arising in or related to a case under Title 11, and because it involves enforcement of rights granted by the United States Bankruptcy Code, and because of the order entered by the judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the "Referral Order") pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984 referring to this Court all core proceedings arising under Title 11, or arising in a case under Title 11, and all proceedings that are not core proceedings, but that are otherwise related to a case under Title 11.

6. Further, this Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. Section 1334, 28 U.S.C. Section 157(b)(2), and the "Referral Order," because this is a core proceeding as defined in 28 U.S.C. Section 157(b)(2)(o) in that it concerns the recovery of monies owed to the estate and thus will directly effect the liquidation of assets of the estate.

Facts

7. The Debtor was, at all times hereafter mentioned, a motor common carrier operating in interstate commerce pursuant to authority issued by the Interstate Commerce Commission (ICC).

8. The Defendant tendered freight to the Debtor for transportation in interstate commerce. The Debtor accepted such freight and performed the transportation services pursuant to the authority issued to the Debtor by the ICC and subject to the tariff rates and rules provisions the Debtor had filed with the ICC at the time the shipments were handled.

9. Pursuant to 49 U.S.C. Section 10761(a), the Debtor must charge and the Defendant must pay as compensation for the transportation services performed by the Debtor the rate specified in the Debtor's duly filed tariffs.

10. Pursuant to the aforementioned freight bill audit contract entered into between the Debtor and Mark, Mark audited all of the shipments handled by the Debtor for Defendant by comparing the commodities, weights, points of origin, destination, and declared value of each shipment to the applicable tariff rate and rules provisions that the Debtor had on file with the ICC, and which were effective at the date of the shipment. The result of said audit was the creation of balance due invoices in the total amount of $58,651.83. Copies of invoices evidencing this debt are attached hereto, marked Exhibit A and are incorporated herein by reference.

11. In addition to the balance due invoices referred to in paragraph 9, Defendant owes the Debtor $24,201.90 for previously billed but unpaid invoices, resulting in a total debtor to the Debtor of $82,853.73. Copies of invoices evidencing this debt are attached hereto, marked Exhibit B, and are incorporated herein by reference. The Debtor has made repeated demands upon the Defendant for the payment of $82,853.73, but the Defendant refused to pay said sum and $82,853.73 remains unpaid.

12. Pursuant to the provisions of the Debtor's tariff filed with the ICC under ICC CAXN 101, Item No. 435, Plaintiffs are entitled to recover from Defendant a late payment charge at the rate of 1.5% per month on the outstanding balance due the Debtor from Defendant, plus attorney's fees and expenses computed at 33% of the transportation and late payment charges due on the Debtor's freight bills. A copy of this tariff

provision is attached hereto as Exhibit C and incorporated herein by reference.

WHEREFORE, the Plaintiffs respectfully pray the Court for the following relief:

1. That the Plaintiffs have and recover of the Defendant the sum of $82,853.73.

2. That the Plaintiffs have and recover of the Defendant the late payment charges calculated at 1.5% per month of the outstanding balance due the Debtor from the date said invoices were submitted to Defendant for payment.

3. That the Plaintiffs have and recover of the Defendant attorney's fees computed at 33% of the outstanding invoices, plus late charges due the Debtor.

4. That the Plaintiffs have and recover of the Defendant the costs of this action.

5. For such other and further relief as the Court deems just and proper.

This the 18th day of December, 1986.

/s/ Langdon M. Cooper
LANGDON M. COOPER, Trustee

By: /s/ Langdon M. Cooper
Langdon M. Cooper
MULLEN, HOLLAND
& COOPER, P.A.
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By: /s/ Joseph L. Steinfeld, Jr.
Joseph L. Steinfeld, Jr.
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(Exhibits Omitted in Printing)

UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

IN RE:	)	Case No.
CAROLINA MOTOR EXPRESS, INC.	)	SH-B-86-00226 (Chapter 7)
I.D. No.: 56-1299892	)	
	)	
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC.	)	Adversary Proceeding No. 87-0028
and	)	
MARK & ASSOCIATES OF NORTH CAROLINA, INC. Plaintiffs,	)	COMPLAINT to recover freight charges
v.	)	
PETER C. REITER, Defendant.	)	(Filed Jan. 29, 1987)

The Plaintiffs, Langdon M. Cooper, Trustee in bankruptcy for Carolina Motor Express, Inc., (hereinafter called "Trustee") and Mark & Associates of N h Carolina, Inc. (hereinafter called "Mark") complaining of the Defendant, Peter C. Reiter (hereinafter called "Reiter") alleges and says that:

Parties and Jurisdiction

1. The Trustee, a resident of Gaston County, North Carolina is the duly appointed, qualified and currently serving Trustee of Carolina Motor Express, Inc., Debtor (hereinafter called the "Debtor) having been so appointed by this Court on November 7, 1986, an order for relief under Chapter 11 of Title 11 in the United States Bankruptcy Code (the "Code") having been entered by this Court on May 2, 1986, and approval of conversion of this case to a Petition for Relief under Chapter 7 having been approved by this Court on November 22, 1986.

2. Mark is a North Carolina corporation which was hired by the Debtor pursuant to a contract approved by this Court on July 15, 1986, to audit the Debtor's freight bills, and if the bills were found to be undercharged to rebill the same and collect the balance due charges. As part of said contract, Mark is authorized to commence litigation to collect the balance due invoices in the name of the Debtor and through counsel of its choice.

3. The Defendant Reiter is a sole proprietor doing business as a transportation broker licensed by the Interstate Commerce Commission with its principal place of business at 10424 Parakeet Circle, Fountain Valley, California 92708.

4. This is an adversary proceeding under Bankruptcy Rule 7001(1) related to the above-referenced bankruptcy case now pending before this Court, and in this adversary proceeding, the Plaintiffs seek to recover money owed by the Defendant to the Debtor for failure to fully pay for services rendered by the Debtor to the Defendant as is more particularly described below.

5. This Court has jurisdication [sic] over this action pursuant to 28 U.S.C. Section 1334 because this is a proceeding arising under Title 11 or arising in or related to a case under Title 11, and because it involves enforcement of rights granted by the United States Bankruptcy Code, and because of the order entered by the judges of the United States District Court for the Western District of North Carolina on July 30, 1984 (the "Referral Order") pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984 referring to this Court all core proceedings arising under Title 11, or arising in a case under Title 11, and all proceedings that are not core proceedings, but that are otherwise related to a case under Title 11.

6. Further, this Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. Section 1334, 28 U.S.C. Section 157(b)(2), and the "Referral Order," because this is a core proceeding as defined in 28 U.S.C. Section 157(b)(2)(o) in that it concerns the recovery of monies owed to the estate and thus will directly effect the liquidation of assets of the estate.

Facts

7. The Debtor was, at all times hereafter mentioned, a motor common carrier operating in interstate commerce pursuant to authority issued by the Interstate Commerce Commission (ICC).

8. The Defendant tendered freight to the Debtor for transportation in interstate commerce. The Debtor accepted such freight and performed the transportation services pursuant to the authority issued to the Debtor by the ICC and subject to the tariff rates and rules provisions the Debtor had filed with the ICC at the time the shipments were handled.

9. Pursuant to 49 U.S.C. Section 10761(a), the Debtor must charge and the Defendant must pay as compensation for the transportation services performed by the Debtor the rate specified in the Debtor's duly filed tariffs.

10. Pursuant to the aforementioned freight bill audit contract entered into between the Debtor and Mark, Mark audited all of the shipments handled by the Debtor for Defendant by comparing the commodities, weights, points of origin, destination, and declared value of each shipment to the applicable tariff rate and rules provisions that the Debtor had on file with the ICC, and which were effective at the date of the shipment. The result of said audit was the creation of balance due invoices in the total amount of $13,408.31. Copies of invoices evidencing this debt are attached hereto, marked Exhibit A and are incorporated herein by reference.

11. The Debtor has made demand upon the Defendant for the payment of $13,408.31, but the Defendant refused to pay said sum and $13,408.31 remains unpaid.

12. Pursuant to the provisions of the Debtor's tariff filed with the ICC under ICC CAXN 101, Item No. 435, Plaintiffs are entitled to recover from Defendant a late payment charge at the rate of 1.25% per month on the outstanding balance due the Debtor from 15 days after the date of original billing of Defendant, plus attorney's fees and expenses computed at 33% of the transportation and late payment charges due on the Debtor's freight bills. A copy of this tariff provision is attached hereto as Exhibit B and incorporated herein by reference.

WHEREFORE, the Plaintiffs respectfully pray the Court for the following relief:

1. That the Plaintiffs have and recover of the Defendant the sum of $13,408.31.

2. That the Plaintiffs have and recover of the Defendant the late payment charges calculated at 1.25% per month of the outstanding balance due the Debtor from 15 days after the original date the bills were submitted to Defendant for payment.

3. That the Plaintiffs have and recover of the Defendant attorney's fees computed at 33% of the outstanding invoices, plus late charges due the Debtor.

4. That the Plaintiffs have and recover of the Defendant the costs of this action.

5. For such other and further relief as the Court deems just and proper.

This the 26th day of January, 1987.

/s/ Langdon M. Cooper
LANGDON M. COOPER, Trustee

By: /s/ Langdon M. Cooper
Langdon M. Cooper
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& COOPER, P.A.
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By: /s/ Joseph L. Steinfeld, Jr.
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(Exhibits Omitted In Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE: CAROLINA MOTOR EXPRESS, INC. I.D.No.: 56-1299892	)	Case No. SH-B-86-00226 (Chapter 7)
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC., Plaintiffs,	)	ADVERSARY PROCEEDING NUMBER 86-0498
v.	)	ANSWER (Filed Jan. 20, 1987)
CALIFORNIA CONSOLIDATED ENTERPRISES, INC., Defendant.	)	

The Defendant in the above-described proceeding, CALIFORNIA CONSOLIDATED ENTERPRISES, INC., does hereby answer the Complaint of the Plaintiffs, as follows:

1. The allegations of Paragraph 1 are admitted upon information and belief.

2. The Defendant is without sufficient information to form a belief as to the allegations of Paragraph 2, and they are, therefore, denied.

3. The allegations of Paragraph 3 are admitted.

4. It is admitted that this is an adversary proceeding, and that the Plaintiffs seek to recover money from the Defendant; but, the Defendant denies that it has failed to fully pay for the Debtor's services, except as it may admit otherwise in its answer to Paragraph 11 hereinafter.

5. The allegations of Paragraph 5 are admitted upon information and belief.

6. The allegations of Paragraph 6 are admitted upon information and belief.

7. The Defendant is without sufficient information upon which to form a belief as to the allegations of Paragraph 7, and they are, therefore, denied.

8. The Defendant admits that it tendered freight to the Debtor, that the Debtor accepted such freight, and transported the freight in interstate commerce. The Defendant is without sufficient information to form a belief as to the other allegations of Paragraph 8, and they are, therefore, denied.

9. The allegations of Paragraph 9 are denied.

10. The allegations of Paragraph 10 are denied.

11. The Defendant acknowledges that it owes the Plaintiffs some portion of the $24,201.90 previously billed but unpaid invoices, as that amount will be reduced by some $7,000.00 to $8,000.00 in claims filed with the Plaintiff, but not acknowledged in any way by the plaintiff; and, as that amount may be further reduced by other claims presented at trial time. The other allegations of Paragraph 11 are denied.

12. The allegations of Paragraph 12 are denied.

FIRST DEFENSE

Pursuant to Section 7012 of the Rules of Bankruptcy Procedure and Rule 12(b) of the Federal Rules of Civil Procedure, the Defendant respectfully moves the Court to dismiss the Plaintiff, Mark & Associates of North Carolina, Inc., for the reason that it has no relationship with the Defendant which would make the Defendant liable to it upon any ground. Mark's contract is with the other Plaintiff, not this Defendant.

SECOND DEFENSE

1. From the beginning of the business relationship between the Plaintiff-Carrier and the Defendant, the Plaintiff-Carrier held itself out and was dealt with by the Defendant as a contract carrier. The Carrier repeatedly assured the Defendant that it had both contract and common carrier authority on file with the Inter-state Commerce Commission. The Defendant repeatedly asked the Carrier for a copy of its contract authority but it was never produced.

2. If the Plaintiff-Carrier held contract carrier authority, as it repeatedly assured the Defendant that it did, and rates satisfactory to the Plaintiff-Carrier and the Defendant were agreed upon, as reflected by Exhibit A attached hereto, then the fact that the Plaintiff-Carrier acted also as a common carrier, and published its tariff as required by 49 USC §10761 would not detract from the reasonableness or appropriateness of the contract carrier rates agreed upon by the Plaintiff-Carrier and the Defendant.

THIRD DEFENSE

The Plaintiff-Carrier in Exhibit A attached hereto – the cover letter and the "Confirmation of Rates" attached thereto – indicated to the Defendant that the Plaintiff-Carrier has the authority to transport the Defendant's freight to the points indicated and at the rates stated; the Defendant accepted the offer so stated; and, the Defendant relied upon the Plaintiff-Carrier's representation that it had published or would publish the rates agreed upon, and had the authority to transport the Defendant's freight at those rates, reliance which now works to the gross detriment of the Defendant, if the collection of the alleged undercharge is allowed.

FOURTH DEFENSE

At no time prior to this suit by the Bankruptcy Trustee was the Defendant notified of the late payment charge of 1.5% (stated as 1.25% in Plaintiff-Carrier's Exhibit C), the arbitrary insurance charge of 3.5% added to the Plaintiff-Carrier's revised invoices, or the 33% attorney fees and expenses – all referred to in Paragraph 12 of the Complaint. Such charges are unreasonable and without foundation.

WHEREFORE, the Defendant prays that the Court:

1. Dismiss the Plaintiff, Mark & Associates of North Carolina, Inc., as a party plaintiff to this action.

2. Dismiss the Plaintiff-Carrier's action as it pertains to the collection of the alleged undercharges and penalties related thereto.

3. Allow so much of the claim as relates to the previously billed but unpaid invoices of the Plaintiff-Carrier, as that amount may be reduced by such loss claims and related costs as may properly be supported by the Defendant in this action.

4. Tax the costs of this action against the Plaintiff-Carrier.

5. Grant such other relief as may be appropriate.

This 20th day of January, 1987.

/s/ Stuart R. Childs
Stuart R. Childs
Attorney for the Defendant
725 East Trade Street
Charlotte, North Carolina
28202
Telephone 704/377-2086

(Certificate of Service Omitted in Printing)

(Exhibits Omitted in Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE:	Case No.
CAROLINA MOTOR EXPRESS, INC.	SH-B-86-00226 (Chapter 7)
I.D.No.: 56-1299892	
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC., Plaintiffs,	ADVERSARY PROCEEDING NUMBER 87-0028
v.	ANSWER
PETER C. REITER, Defendant.	(Filed Feb. 27, 1987)

The Defendant in the above-described proceeding, PETER C. REITER, does hereby answer the Complaint of the Plaintiffs, as follows:

1. The allegations of Paragraph 1 are admitted upon information and belief.

2. The Defendant is without sufficient information to form a belief as to the allegations of Paragraph 2, and they are, therefore, denied.

3. The allegations of Paragraph 3 are admitted.

4. It is admitted that this is an adversary proceeding, and that the Plaintiffs seek to recover money from the Defendant; but, the Defendant denies that he has failed to fully pay for the Debtor's services.

5. The allegations of Paragraph 5 are admitted upon information and belief.

6. The allegations of Paragraph 6 are admitted upon information and belief.

7. The Defendant is without sufficient information upon which to form a belief as to the allegations of Paragraph 7, and they are, therefore, denied.

8. The Defendant admits that he tendered freight to the Debtor, that the Debtor accepted such freight, and transported the freight in interstate commerce. The Defendant is without sufficient information to form a belief as to the other allegations of Paragraph 8, and they are, therefore, denied.

9. The allegations of Paragraph 9 are denied.

10. The allegations of Paragraph 10 are denied.

11. The Defendant denies that payment in any amount is due from the Defendant to the Plaintiff, and admits that demand has been made and the Defendant has refused to pay more than was originally agreed upon by the Plaintiff and the Defendant.

12. The allegations of Paragraph 12 are denied.

FIRST DEFENSE

Pursuant to Section 7012 of the Rules of Bankruptcy Procedure, and Rule 12(b) of the Federal Rules of Civil Procedure, the Defendant respectfully moves the Court to dismiss the Plaintiff, Mark & Associates of North Carolina, Inc., for the reason that it has no relationship with the Defendant which would make the Defendant liable to it upon any ground. Mark's contract is with the other Plaintiff, not this Defendant.

SECOND DEFENSE

1. The Debtor-Carrier contacted the Defendant in December of 1984, offering its transportation services to the Defendant. The Defendant indicated that the parties could do business together; however, the Defendant requested of the Debtor-Carrier that it furnish him with a copy of its tariff in order that an agreed upon basis be established for conducting business. In Defendant's Exhibit A attached hereto, the Debtor-Carrier failed to furnish the Defendant with a copy of the tariff, stating: "The tariff is voluminous and we will handle anything that pays over $.90 per mile."

2. From December 20, 1984, the date of Exhibit A attached hereto, the salesmen, dispatchers, and officers of the Debtor-Carrier continually contacted the Defendant requesting that as much freight be handled by the Defendant through the Debtor-Carrier upon the basis established by Exhibit A as possible, and this pressure for more business continued on the Defendant right up to the time the Debtor-Carrier filed in bankruptcy.

3. The Trustee in Bankruptcy has no right now unilaterally to create a new contract between the Debtor-Carrier and the Defendant.

THIRD DEFENSE

The Defendant dealt in good faith with the Debtor-Carrier based upon the criteria in Exhibit A hereto; if the Debtor-Carrier failed properly to publish its rates; or, charged an improper rate; the Debtor-Carrier was negligent by not so informing the Defendant.

FOURTH DEFENSE

Neither the insurance arbitrary charges, the penalties sued for in the complaint, some of the freight bills attached to the Complaint, nor the alleged undercharges, were made known to the Defendant prior to this Bankruptcy action and should, therefore, not be allowed by this Court.

WHEREFORE, the Defendant prays that the Court:

1. Dismiss the Plaintiff, Mark & Associates of North Carolina, Inc., as a party plaintiff to this action.

2. Dismiss the Debtor-Carrier's action as it pertains to the collection of the alleged undercharges and penalties.

3. Issue judgement in favor of the Defendant against the Plaintiffs that the Plaintiffs recover nothing of this Defendant, and that the costs of this action be taxed against the Plaintiffs.

4. That the Court grant the Defendant such other relief as may be appropriate.

This 25th day of February, 1987.

/s/ Stuart R. Childs
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Attorney for the Defendant
725 East Trade Street
Charlotte, North Carolina
28202
Telephone: (704) 377-2086

(Certificate of Service Omitted in Printing)

(Exhibits Omitted in Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE:	
CAROLINA MOTOR EXPRESS, INC.	Case No. SH-B-86-00226
I.D. No.: 56-1299892	
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC.	
and	
MARK & ASSOCIATES OF NORTH CAROLINA, INC.	Adversary Proceeding No. 86-0498
Plaintiffs,	
v.	
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF THE DEFENDANT'S MOTION FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION

The defendant, Carolina Consolidated Enterprises, Inc. files this memorandum in support of its above-named motion.

SUMMARY OF ARGUMENT

It is the primary and exclusive right of the Interstate Commerce Commission to determine whether rates and tariff provisions are lawful. The defendant, therefore, argues that the question of the reasonableness and lawfulness of the rates involved in this proceeding should be referred to the Commission. To do otherwise results in a wasteful and duplicative effort by a court and an administrative agency.

STATEMENT OF THE FACTS

The debtor came to the defendant and stated, in writing (see Appendix "A")

> "Please find enclosed an Insurance Certificate, a copy of our operating authority, and a list of states to which we can confirm your rate of $.90 per mile on straight loads and $.95 per mile via route of movement, plus $30.00 per stop on stop-loads."

After the debtor went bankrupt, the defendant was confronted with a claim for much higher charges, coupled with an assertion that *these* were the lawful charges of the carrier.

It is these charges that the defendant disputes, on its contention that these charges are not lawful.

LAW AND ARGUMENT

The first matter that should be addressed is the difference between a legal rate and a lawful rate. The Supreme Court said in ARIZONA Grocery Co. v.

Atchison, Topeka & Santa Fe Ry. Co, 284 U.S. 370, (1931) at page 384

> "In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the **legal** rates, that is, those which must be charged to all shippers alike.
>
> Although the Act thus created a legal rate it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burdon of conforming its charges to that standard. In other words, the legal rate was not made by the statute of lawful rate, – it was lawful only if it was reasonable.
>
> The act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of published rate." (footnotes omitted)

Thus, whether rates are reasonable, and thus lawful, is to be determined by the Commission.

A shipper has a right to file a complaint, at any time, challenging the reasonableness of a motor carrier rate or practice 49 U.S.C. Sec. 10701(a) and 10704(b).

The Commission can find that it would be an unreasonable practice for a carrier to collect under charges, *Seaboard System Railroad, Inc.* v. U.S. 794 F. 2d 635 (11th Cir. 1986), (Appendix "B" attached).

As the Court said, at page 638

"The Commission acknowledged in its order that it too historically has refused to order the waiver of undercharges based on carrier rate misquotations, because granting such relief might lead to intentional "misquotations" by carriers seeking to discriminate in favour of particular shippers. Nonetheless, the courts have never held that the Commission lacks authority to prohibit the unreasonable collection of undercharges. In none of the cases cited above had there been a waiver of undercharges by the Commission. As the Commission stated, finding a carrier practice unreasonable is kind of determination that lies in the primary jurisdiction of the Commission. **See Nader v. Allegheny Airlines, Inc.,** 426 U.S. 290, 304-05, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643 (1976).

In addition to the question of the misrepresentation of the rates, the Commission would also be asked to determine the lawfulness of the interest charges and the provision for attorneys fees. *Seaboard* supra supports the referral of such matters to the Commission for it's determination of the tariff rates, and that the proceeding be held in abeyance pending the determination of these issues.

Further, the defendant has raised the issue that the goods moved for, at least some of the time, under the debtors contract carriage authority, and that, too, would be proper matter for the Commission to determine.

If the Court does not refer the matter to the Commission, the defendant will file a complaint with the Commission, challenging the reasonableness and lawfulness

of the Debtor's rates and practices. This will result in two tribunals expending valuable time on the same items.

It appears more logical and reasonable to refer it to the Commission and thus prevent an unneccessary [sic] duplication of effort.

CONCLUSION

For the reasons cited, the question of the lawfulness of the misrepresented rates, and of the other tariff provisions, should be referred to the Commission for it's determination, and this proceeding should be held in abeyance pending the determination of those issues by the Commission.

Respectfully submitted this 17th day of March, 1987.

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(704) 377-2086

(Certificate of Service Omitted in Printing)

(Appendix Omitted in Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE: CAROLINA MOTOR EXPRESS, INC.; I.D.No.: 56-1299892	)	Case No. SH-B-86-00226
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC. Plaintiffs, v. CALIFORNIA CONSOLIDATED ENTERPRISES, INC., Defendant.	)	Adversary Proceeding No. 86-0498

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR REFERRAL TO INTERSTATE COMMERCE COMMISSION

Langdon M. Cooper (Trustee) and Mark Associates of North Carolina, Inc. (Mark), Plaintiffs, make the following response in opposition to Defendant California Consolidated Enterprises, Inc.'s (CCE) Motion for Referral to the Interstate Commerce Commission:

1.
SUMMARY OF ARGUMENT

This case is a straight collection case involving the collection of freight charges pursuant to Carolina Motor Express, Inc.'s (Debtor) interstate motor common carrier tariffs filed with the Interstate Commerce Commission (ICC). The total sum sought to be collected is $82,853.73, plus prejudgment interest at 15% per annum and attorneys fees of 33%. The interest and attorney's fees are also assessed pursuant to the Debtor's ICC tariff.[1]

The special and/or technical expertise of the ICC is not necessary to determine CCE's indebtedness to Plaintiffs. All of the tariff provisions at issue are published and can be understood by a reader of average intelligence. (A copy of the appropriate tariff items are attached as Appendix A.) The correct rate to be charged is determined by multiplying the number of miles traveled by the truck times the rate expressed in cents per mile. Additional charges are assessed for each stop for pickup and/or delivery made by the truck exclusive of the first pickup and final delivery. Also an insurance surcharge of 3.5% has been added to certain bills to reflect the special rate increase filed by the Debtor with the ICC to cover the increased insurance costs experienced by the Debtor since June 1985. The corrected balance due freight bills furnished by Plaintiff as Exhibit A to the Complaint show

---

[1] The principal amount prayed for in the Complaint contains $24,201.90 worth of freight bills which were original billings that remain outstanding, and $58,651.83 worth of balance due bills which were created as a result of Mark's audit of the Debtor's freight records.

the mileage, stop and insurance charges. The simple fact is that CCE has not paid the filed tariff rate on the balance due bills as it is obligated to do pursuant to 49 U.S.C. 10761(A) (historically referred to as the "filed rate doctrine"). Also, for no apparent reason, the Defendant has failed to pay the original freight bills attached as Exhibit B to the Complaint. Since payment of the tariff rate is mandated by law, and there is no doubt as to what is the proper rate, there is no need for referral to the ICC.

2.
STATEMENT OF THE FACTS

Following the Bankruptcy Court's approval of the audit contract, Mark audited the Debtor's freight bills to determine whether the Debtor's customers had paid the lawful rates published in the Debtor's tariffs filed with the ICC. Mark's audit concluded that certain of Debtor's customers had underpaid, that is, that certain customers had paid lower freight charges than those charges set forth in the applicable tariffs. The Defendant is such a customer. The defendant has failed to pay certain original billings as well.

The defendant is an ICC licensed property broker who was a major shipper/customer of the Debtor. By its own admission in its Answer, the Defendant was familiar with the Debtor's legal duty to charge, and the Defendant's legal duty to pay, the filed tariff rates. By its motion, Defendant now requests the Court to refer this case to the ICC under the doctrine of primary jurisdiction so that it can avoid paying those legal charges. The fact

show that such a referral is not necessary and will result only in delaying the collection of the involved charges.

Defendant alleges that the transportation services rendered by the Debtor were performed as a contract carrier and paid pursuant to a "contract" rate, rather than the filed tariff rate. (See Defendant's Second Defense). In the alternative, the Defendant alleges that the Debtor, while acting as a common carrier, "indicated" that certain rates would apply as stated in a "confirmation of rates sheet." (See Defendant's Third Defense.) By its Answer, Defendant admits that the transportation services set forth in the Complaint were furnished to Defendant by the Debtor. The Defendant also admits it failed to check with the ICC or obtain from the Debtor a copy of the filed rates to confirm the legal charges. The Defendant also failed to obtain a copy of the Debtor's alleged contract carriage authority. In fact, the letter attached as Exhibit A to Defendant's Answer does not refer to any contract authority and could not have enclosed a copy thereof since, at the time of the writing (November 21, 1984), the Debtor did not possess ICC contract carriage authority. (Attached hereto as Appendix B is a copy of the Debtor's contract carrier Permit which shows a service date of March 7, 1985.) More importantly the Defendant has failed to produce or even allege the existence of a bilateral contract. A written, executed, bilateral contract is mandatory in order for contract rates to apply. See 49 C.F.R. 1053.1 (Appendix C hereto).

Now, to avoid the assessment of the legal charges by the Trustee, the Defendant claims the collection of the balance due freight charges, set forth in the Complaint, would be an "unreasonable practice" under the Interstate

Commerce Act. In so doing, Defendant's Answer and Motion merely allege the same equitable defenses that have been repeatedly rejected by the courts (including numerous Supreme Court decisions) in favor of upholding the filed tariff as the *only* permissible charge.

3.
LAW AND ARGUMENT

The basis of the Trustee's opposition to Defendant's Motion for Referral to the ICC is that the ICC's technical expertise is not required under the facts of this case. The issue here is purely a question of law. That is, whether a shipper's claim that a carrier intentionally or mistakenly misquoted and applied a rate, inconsistent with a carrier's lawfully filed tariff with the ICC, presents a valid defense in an action at law to recover the legal tariff rate. This question has been consistently resolved by the courts in favor of the correct rate set out in the filed tariff.

The United States Supreme Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) the Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed in the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* (Emphasis supplied.)

In *Armor Packing Co. v. U.S.*, 209 U.S. 56, 81 (1908), the Court announced the following rationale for this rigid rule:

> If the rates (filed and published as required by law) are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

The Supreme Court has applied this rule of law every time it has addressed the issue of adherence to lawful common carrier rates. See e.g., *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 553, 535 (1983) (carrier has absolute right to collect tariff charges on every shipment); *Southern Pacific Transportation Co. v. Commercial Metals Co.* 456 U.S. 336, 343-44 (1982) (equitable defense of carriers violation of ICC credit regulations rejected); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Louisville & N.R.R. v. Central Iron & Coal*, 265, U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interest commerce); and *Louisville & R.R.R. v. Rice*, 247 U.S. 201, 202 (1918) (where the court stated that a carrier's claim is, of necessity, predicted on the tariff – not an understanding with the shipper.)

The U.S. Courts of Appeal have also consistently applied the "filed rate doctrine." See *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 778, F2d 1365, 1372 (9th Cir. 1985) (Penalty provision in a tariff which provides for charges ten times the normal rate upheld despite carrier's failure to reveal its existence to the shipper). (Appendix D hereto) *Louisville & N.R.R. v. Mead Johnson & Co.* 737 F.2d 683 (7th Cir. 1984) (misquotation of rate held not a bar to later recover of correct rate); *Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363

(D.C. Cir 1980) (carrier awarded diffence [sic] between agreed upon "contract rates" and published rates); *Illinois Central Gulf Railroad Company v. Golden Triangle Wholesale Gas Company*, 586 F.2d 588, 592 (5th Cir. 1978) (estoppel defense rejected, storage charges in tariff applied despite repeated assurances by carrier that they would not apply); *Nyad Motor Freight, Inc. v. W.T. Grant Co.*, 486 F.2d 1112, 1114 (2d Cir. 1973) (filed rate applied despite non-filed contract of parties to apply lower rate); *Chicago V&R Co. v. Ready Mix Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973); *Bower & Campbell v. Knox Glass, Inc.*, 390 F.2d 193, 196 (3d Cir. 1968); and *Norfolk & Western R. Co. v. American Comp. St. Corp.*, 181 F.2d 183, 184 (6th Cir. 1950).

The "filed rate doctrine" is so absolute that a claim for relief from the filed rate cannot even be predicated on a carrier's alleged fraudulent or intentional misquotation of rates. *Consolidated Freightways Corp. v. Terry Tuck, Inc* 612 F.2d 465 (9th Cir. 1980) *cert. denied*, 447 U.S. 907 (1980) (counterclaim for fraud dismissed); *Missouri Pacific R. Co. v. Rutledge Oil Co.*, 669 F.2d 557 (8th Cir. 1982) (ICC Act precludes shippers from asserting estoppel defense of detrimental reliance); *Paulson v. Greyhound Lines, Inc.*, 628 F. Supp 881 (D. Minn. 1986), aff'd. ___ F.2d ___, 1986 Fed Carr. (CCH) par. 83,287 (fraudulent guarantee of next day delivery not grounds for damages as next day service not contained in tariff). (5th Cir. 1986), (Appendix E. hereto).

When faced with eighty years of contrary judicial precedent, the Defendant is forced to rely upon *Ex Parte* No. MC-177 *National Industrial Transportation League – Petition to Initiate Rulemaking on Negotiated Motor Common Carrier Rates* (Served 10/22/86) (Appendix F hereto), in

an effort to establish equitable defenses to the requirements of 49 U.S.C. Section 10761(a). At the outset, it should be noted that this is a non-binding policy statement which is contrary to years of unbending judicial statutory construction. The policy statement is inconsistent with the statutory mandate of 49 U.S.C. 10761(a) and is without a reasonable basis in law. Thus, the policy statement is not entitled to deference by this Court. Cf. *SEC v. Sloan*, 436 U.S. 103, 1118-19 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

While agreeing to give its advisory opinion, the Commission readily admits that a referring court can ignore its findings and decide for itself what rate should apply. (*Ex Parte* No. MC-177, p.8). It is submitted that such deference to the courts in this matter is an admission by the Commission that it really has no right under law to order deviation from the filed rate and that Ex Parte No. MC-177 is merely an attempt to appease disappointed shippers who have requested that the Commission grant them relief from the filed rate doctrine – relief which the courts have universally refused to allow.

Eighty years of judicial precedent is disposited on the issue before this court. Elevating a shipper's quoted rate allegation to a cognizable defense sharply departs from the law enacted by Congress and consistently enforced by courts. The Commission's jurisdiction to grant relief from lawfully filed rates applicable to past shipments is circumscribed by the Interstate Commerce Act. See *Mammoth Plastics, Inc. v. National Classification Board*, 341 I.C.C. 15, 17, 18 (1972) (wherein the ICC recognizes that it has no jurisdiction to award reparations on past shipments). (Appendix G, hereto). Exclusive jurisdiction over actions

for motor carrier undercharges and actions for reparation is vested in the courts and not in the commission. 49 U.S.C. Sections 11705(a) and 11705(c)(2). When the alleged unreasonable practice involves a violation of a filed rate (not the reasonableness of the rate itself) the Courts and not the Commission have exclusive jurisdiction to determine and apply the proper charge. *I.C.C. v. J.B. Montgomery, Inc.*, 483 F. Supp. 279 (D Colo. 1980). (Appendix H, hereto), *Farley v. Santa Fe*, 778 F.2d at 1370-71.

In *J.B. Montgomery*, the ICC, on behalf of various shippers, sought restitution for past duplicate billings or overcharges, in addition to prospective injunctive relief. The defendants argued that the case should have been remanded to the ICC for agency proceedings on whether the defendants' practices were unreasonable and/or discriminatory. The Court rejected the defendant's attempt to refer the case to the ICC stating:

> in this case the primary issue is not the reasonableness of the rates as filed with the ICC, but whether the defendants have been operating in violation of those rates. While the former question clearly does involve the expertise of the ICC, the latter does not.

483 F.Supp. at 281.

In *Farley*, the plaintiff argues that Santa Fe's motion for summary judgment on the issue of the filed rate doctrine should have been stayed pending referral of the matter to the ICC contending that the tariff which required Farley to pay a penalty of ten times the normal rate for failure to comply with an audit was unreasonable as applied to the facts of its case. Farley did not argue

that the tariff provision was unreasonable on its face or that its language was not used in the ordinary sense. Rather, Farley sought referral based on the practice of applying the tariff in its particular case. The Ninth Circuit Court of Appeals rejected this argument finding that referral is not proper where the referring party admits the tariff is unambiguous and reasonable on its face. 778 F.2d at 1371.

In *Civil Aeronautics Board v. Modern Air Transport*, 179 F.2 [sic] 622 (2d Cir. 1950), the Court held that the doctrine of primary jurisdiction:

> . . . is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule. Thus, it has been continuously asserted that the courts have original jurisdiction to interpret tariffs, rules and *practices* where the issue is one of violation, rather than reasonableness. (Emphasis supplied.)

The case before this Court is the same type of case that the District Court in *J.B. Montgomery* and the Circuit Court in *Farley* refused to refer to the ICC. The only difference being that in *J.B. Montgomery*, the carrier had charged in excess of its published tariff rate and the ICC was seeking restitution on behalf of the shippers who had paid too much, and in *Farley* a penalty provision was enforced rather than the base tariff rate. In this case, the Debtor charged below its filed tariff and the Trustee is merely seeking to have the Defendant pay the appropriate published tariff charges plus attorneys fees and interest to the estate. In all three cases, the issue is one of

violation of the published tariff charge, not the reasonableness of the rate. The case law is clear that when it comes to the practice of violating a published tariff rate, referral to the ICC is improper. In *Re Silverwheel Freight Lines, Inc.*, (1986, B.C.D. Or) ___ B.R. ___, Case No. 382-03538-S7, Adversary Proceeding No. 85-0743-S (Appendix I, hereto).

Although federal regulation of motor carriers was changed by the Motor Carrier Act of 1980, P.L. 96-296, July 1, 1980, the 1980 Act did not change the strict requirements of 49 U.S.C. Section 10761(a). This was recently made clear by the Supreme Court in *Square D Co. v. Niagra Frontier Tariff Bureau*, ___ U.S. ___, 106 S.Ct. 1922 (1986) and in *R.C.C.C. v. U.S.*, 793 F.2d 376 (D.C. Cir. 1986).

In *Square D*, the Supreme Court revisited the filed rate doctrine in an anti-trust context. It concluded that the 1980 Motor Carrier Act did not alter the statutory requirement. In that case, the court said:

> The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by contract or tort of the carrier

Square D v. Niagra, ___ U.S. ___, 106 S. Ct. at 1927-28, n. 23.

In *R.C.C.C.*, the D.C. Circuit found the ICC without statutory authority to waive the requirements of 49 U.S.C. Section 10761(a), stating:

> That requirement (for a rate to be contained in a tariff) is utterly essential to the Act. Without it, for example it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, *see* 49 U.S.C. Sections 10701 and 10741(b) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, *see* 49 U.S.C. Sections 10708 (a)(1) & 11701(a).

In *R.C.C.C.* the D.C. Circuit determined that the changes brought about by the 1980 Act did not give the ICC authority to waive the tariff filing adherence requirements for motor carriers mandated by 49 U.S.C. Section 10761(a). Thus the commission's assertion in Ex Parte No. MC-177 that the Motor Carrier Act of 1980 somehow created an "environment" in which equitable defenses to a filed rate may be allowed is simply wrong.

4.
CONCLUSION

For the reasons set forth above, Defendant's Motion for Referral to the Interstate Commerce Commission should be denied.

The applicable statutes and case law actively demonstrate that the instant case is to be determined by the resolution of a question of law. Referral to the ICC for the purpose of determining the validity of CCE's negotiated rate defense, under the facts herein will serve no purpose other than to delay this case. CCE was aware of the legal requirement to pay the Debtor's published tariff charges at the time CCE tendered freight to the Debtor. The

defendant should not now be allowed to further and unreasonably delay these proceedings through a referral to the ICC which has no basis in law or fact.

Respectfully submitted this 9th day of March, 1987.

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(Appendix Omitted in Printing)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE: CAROLINA MOTOR EXPRESS, INC. I.D. No.: 56-1299892	)	Case No. SH-B-86-00226
LANGDON M. COOPER, Trustee in Bankruptcy for CAROLINA MOTOR EXPRESS, INC. and MARK & ASSOCIATES OF NORTH CAROLINA, INC. Plaintiffs, v. CALIFORNIA CONSOLIDATED ENTERPRISES, INC., Defendant.	)	Adversary Proceeding No. 86-0498

PLAINTIFFS' REPLY TO DEFENDANT'S MEMORANDUM OF LAW FILED IN SUPPORT OF DEFENDANT'S MOTION FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION

Langdon M. Cooper (Trustee) and Mark & Associates of North Carolina, Inc. (Mark), Plaintiffs, make the following reply to Defendant, California Consolidated Enterprises, Inc.'s (CCE), Memorandum in Support of a Motion for Referral to the Interstate Commerce Commission:

DEFENDANT'S RELIANCE UPON SEABOARD SYSTEMS IS MISPLACED AS SEABOARD SYSTEMS DID NOT DEAL WITH A NEGOTIATED, BUT UNFILED RATE CASE

A comparison of the facts in the instant case with the facts contained in *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986), highlights the reasons that this case should not be referred to the Interstate Commerce Commission.

In *Seaboard*, a railroad sued to collect undercharges based upon a higher single car rate from a shipper which was promised and billed by the railroad a lower multi-car rate. Both rates were filed with the ICC, but only the higher rate applied to the carrier. The two rates were listed adjacent to each other in the carrier's filed tariff. The action was stayed pending an ICC determination of the reasonableness of enforcing the higher filed rate. The ICC concluded that even though the higher rate was not technically ambiguous, it had, "lent itself to misinterpretation by the ordinary user (here the shipper) and the shipper relied on (the railroads') continued misquotations and misbillings, to the shipper's substantial detriment." *Seaboard* 794 F2d at 637.

The Eleventh Circuit in upholding the Commission's decision to apply the lower filed rate over the higher filed rate, found that it was not contrary to the Interstate Commerce Act and within the ICC's authority to inquire into the unreasonableness of the freight undercharge collection under the "circumstances presented." These circumstances were as follows:

> The Commission found that the publication of a tariff whose meaning is not plain to the ordinary

> user, combined with misquotation of the applicable rate under that tariff and a shipper's reliance on the misquotation to its detriment, constitute circumstances under which the Commission may find that the collection of undercharges would be an unreasonable practice. The Commission emphasized that there *must* be difficulty in interpreting the tariff such that the shipper reasonably relied on the carrier's interpretation and did so to its detriment . . . If the tariff was ambiguous and subject to two interpretations, the case is even stronger to support the Commission's decision. (Emphasis added).

The test set forth in *Seaboard* is not met in the instant case. First, there was no difficulty in interpreting the Debtor's tariff. Second, CCE did not rely upon the Debtor's interpretation of the tariff since no tariff was ever provided to CCE. Third, the Debtor's tariff was not ambiguous and subject to two interpretations. Finally, as indicated in the Plaintiffs' initial Opposition to Defendant's Motion to Referral, CCE as a licensed ICC broker is a sophisticated shipper who cannot plead ignorance of the tariff filing requirements of the Interstate Commerce Act. Had CCE took the responsibility to determine what the applicable tariff rate was, it would not be in court today.

Finally, the Court's attention is directed to a recent decision by the Wisconsin Court of Appeals in G.M.W., *Inc. v. Certified Parts Corporation*, ___ N.W.2d ___, 1987 Fed. Carr. (CCH) Para. 83,302 (Wic. Ct. App. 1986), (Appendix "A" hereto), where the Court held that the long standing doctrine that equitable defenses were not available to shippers faced with undercharge collections

action brought by common carriers was not over ruled by statutory changes such as the Motor Carrier Act of 1980, court opinions such as the *Seaboard* case and ICC orders such as Ex Parte No. MC-177.

In response to the concurring Judge's opinion which appeared to give the Defendant the hope of avoiding the imposition of the filed rate doctrine by referral to the ICC, the majority concluded:

> The concurrence would adopt a broad rule permitting courts, in concert with the ICC, to circumvent an act of Congress. Courts are not free to do this. The ICC as it recognizes, is also not free to do this. *Wilson* addresses the significant reasons why Congress adopted the "filed tariff" doctrine, and holds that under the unique facts of that case, the ICC could find part of a tariff unreasonable, and therefore unenforceable. It is another matter all together to suggest that any tariff can be an "unreasonable practice." Such a suggestion raises questions of separation of powers, an issue not raised or argued here.

G.M.W., Inc., ___ N.W.2d ___ at ___, 1987 Fed. Carr. Cases Para. 83,302, Page 58,342.

CONCLUSION

For the reasons set forth above, and in the Plaintiffs' previously filed Opposition to Defendant's Motion to Referral, Plaintiffs respectfully request this Court to deny Defendant's Motion for Referral to the Interstate Commerce Commission.

This the 20th day of March, 1987.

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July 26, 1990

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United States Court of Appeals
for the Fourth Circuit
U.S. Courthouse, Tenth & Main Streets
Richmond, Virginia 23219

Re: Langdon M. Cooper, Trustee in Bankruptcy for
Carolina Motor Express, Inc., et al.
v. Delaware Valley Shippers
v. Peter C. Reiter
v. California Consolidated Enterprises, Inc.
Docket Nos. 89-3259, 89-3261, 89-3262

Dear Mr. Greacen:

Pursuant to your letter of July 16, 1990, the following are appellants' comments on the effects of *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* 58 U.S.L.W. 4862, ___ U.S. ___ (1990) on the above-entitled appeals.

As indicated by Appellants' main brief, these are consolidated appeals from judgments of the District Court for the Western District of North Carolina. In *Delaware Valley* the District Court granted summary judgment to Appellee and denied summary judgment to Appellants

based entirely on the defense that Appellants' action in seeking motor carrier undercharges constituted an unreasonable carrier practice under 49 U.S.C. Section 10701. The District Court first referred *Delaware Valley* to the Interstate Commerce Commission ("ICC") and then adopted the ICC's finding of an unreasonable carrier practice and dismissed the action.

In *California Consolidated* and *Peter C. Reiter*, the District Court reversed the final judgments of the Bankruptcy Court and referred these matters to the ICC based on the determination that the appellees' sole defense, that of unreasonable carrier practices, required referral to the ICC. The Bankruptcy Court in entering judgment for appellants had rejected the unreasonable practice defense as contrary to the "filed rate doctrine" as codified at 49 U.S.C. Section 10761(a).

It is important to note that the District Court based its decisions in all three cases upon the alleged primary jurisdiction of the ICC to consider whether it would be an unreasonable carrier practice for the shippers involved to be required to pay Appellants' undercharge claims when they had previously negotiated lower unfiled rates. (See Joint Appendix at 8, 17, 18, 21, 22, 32, 35, 43-47).

In contrast, the Bankruptcy Court in *California Consolidated* and *Peter C. Reiter* rejected the ICC's "negotiated rates" unreasonable practice jurisdiction and affirmed the filed rate doctrine, stating:

> [T]he Court must, without regard to what its opinion is as to what the law should be, rule with regard to what the law is. And that is, that the "filed rate" doctrine is still the law of the land, and that, without regard to the ingeniousness of the defenses, the Court cannot allow them as they are not allowed by law.

(Joint Appendix at 73).

Maislin Industries firmly supports the legal conclusions reached by the Bankruptcy Court and rejects the line of cases relied upon by the District Court. Accordingly, *Maislin Industries* requires reversal of the District Court in these matters.

In language that parallels that used by the Bankruptcy Court, the Supreme Court in *Maislin Industries* stated:

> Labeling the carrier's conduct an "unreasonable practice" cannot disguise the fact that the ICC is justifying deviation from the filed rate purely on the ground that the carrier and shipper have privately negotiated a lower rate. Stripped of its semantic cover, the *Negotiated Rates* policy and, more specifically, the Commission's interpretation of "unreasonable practices" thus stands revealed as flatly inconsistent with the statutory scheme as a whole [citations omitted] and §§ 10761 and 10762 in particular.

Maj. slip op. at 13-14.

The Supreme Court in *Maislin Industries* further rejected the ICC's and the Appellees' argument, "that under the filed rate doctrine, a finding that the carrier engaged in an unreasonable practice should, like a finding that the filed rate is unreasonable, disentitle the carrier to collection of the filed rate." Maj. slip op. at 11. Instead, the Supreme Court pointedly stated:

> We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule . . . Negotiated Rates policy rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular.

Maj. slip op. at 11, 12.

Maislin Industries, makes it clear that the *only* defense to the collection of a common carrier's filed rates is a challenge to the reasonableness of the rates themselves. However, in *California Consolidated* and *Peter C. Reiter,* the Appellees failed to present any evidence or legal argument before the Bankruptcy Court concerning the rates reasonableness issue left unanswered by the *Maislin Industries* case (See Maj. slip op. at 11, n. 10). Thus reversal and reinstatement of the Bankruptcy Court's judgment is necessary.

In *Delaware Valley* Appellants assume Appellee will argue that it somehow is entitled to raise the issue of rate reasonableness upon remand. A close examination of the record in this proceeding, however, reveals that any request by Delaware Valley that its case be remanded for further proceedings concerning the issue of rate reasonableness is misplaced.

On December 22, 1987, the District Court granted Delaware Valley's Motion to Stay the Action for Referral to the ICC. (See Joint Appendix Pages 77-78). The District Court thus provided the Defendant with the opportunity to raise all of its defenses at the ICC. These defenses included the allegation concerning rate reasonableness.

On January 11, 1988, Delaware Valley filed its petition with the ICC based upon the naked allegation that the rates and practices of Carolina Motor Express were unreasonable. However, when Delaware Valley presented its evidence to the Commission, its allegation concerning rate reasonableness was limited to unsupported arguments that the tariff rates were unreasonable to the extent they exceeded the unfiled, quoted rates. This is another way of saying that the quoted rates are the applicable rates, the conclusion struck down in *Maislin Industries.*

The ICC in rendering its opinion in *Delaware Valley,* upon which the District Court based its order of dismissal, makes no mention of any rate reasonableness finding. (See Joint Appendix 79-81, attached hereto is a copy of the full opinion, as pages 2 and 4 of the opinion were inadvertently not attached to the Appendix). Suffice it to say, Delaware Valley made no showing before the ICC even remotely approaching the reasonableness standard set forth in 49 U.S.C. Section 10701(e). Instead, Delaware Valley pled its case at the ICC based purely on negotiated rates being an unreasonable practice.

If Delaware Valley had any objection to the ICC's failure to address its allegations of rate reasonableness, it should have petitioned the ICC for administrative review of the September 9, 1988 decision. This petition would have been due twenty days after the ICC's decision was served. See 49 C.F.R. Section 1115.3. Alternatively, Appellant could have appealed the ICC's failure to reach the question of rate reasonableness to the District Court within 90 days after the ICC's findings were reported pursuant to 28 U.S.C. Section 1336(c). Because Delaware

Valley failed to seek any review of the ICC's order, Delaware Valley is now jurisdictionally barred from raising these issues on appeal and seeking a *de novo* review.

With the case law now settled concerning Appellees' "unreasonable practice" defenses and with California Consolidated and Peter C. Reiter having never alleged rate unreasonableness, and with Delaware Valley having waived any claim that Carolina Motor's tariffs were unreasonable, it is respectfully suggested that *Maislin Industries* mandates reversal of the District Court's decision in these three cases. Appellants, further request that in *California Consolidated* and *Peter C. Reiter,* this Court issue instructions to the District Court to reinstate the Bankruptcy Court's judgment and rule on Appellants' request for interest and attorney's fees. This Court should also issue instructions to the District Court in *Delaware Valley* to grant Appellants' Motion for Summary Judgment.

Respectfully submitted,

/s/ Joseph L. Steinfeld, Jr.
Joseph L. Steinfeld, Jr.

JLS/gfm (7-25-11.jls)

Enclosure

cc: Langdon M. Cooper, Esquire
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(Certificate Of Service Omitted In Printing)

(Attachment Omitted In Printing)

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July 28, 1990

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Richmond, Virginia 23219

Re: 89-3261 Cooper, et al. v. Reiter CA-88-138-SH-C
89-3262 Cooper, et al. v. California Cons. CA-88-139-SH-C

Dear Mr. Graecen:

This letter is in response to your letter of July 16, 1990, asking for counsels' views on the above entitled cases, considering the recent Supreme Court decision in *Maislin Industries v. Primary Steel, Inc.*, No. 89-624 (June 21, 1990)

In these two cases, this counsel believes that referral of the matter to the Interstate Commerce Commission is not only appropriate, but is now mandatory under *Maislin, supra.*

From the inception of this proceeding, the defendants have alleged that (1) the rates Plaintiffs seek to collect are unreasonable and unlawful in violation of 49 U.S.C.A. Section 10701(a); (2) the tariff sections containing the rates Plaintiffs seek to apply to the shipments in question are not the applicable sections of said tariffs, and if applied to the shipments in question, would violate 49 U.S.C.A. Section 10761 and 10762; and (3) allowing the collection of the tariff rates after lower rates have been negotiated and agreed upon by both parties is an unreasonable practice in violation of 49 U.S.C.A. 10701 (a).

In oral argument before the Court, this counsel argued that:

(1) A filed rate is admittedly a legal rate,

(2) but a legal rate, when challenged, must be shown to be reasonable.

(3) Only is a rate is shown to be reasonable, is it a lawful rate.

(4) Only if it is a lawful rate, can a carrier's suit to collect it be enforced, and

(5) the only entity that can determine whether a rate is reasonable is the Interstate Commerce Commission.

Therefore, when the reasonableness of a rate is challenged, the matter must be referred to the Commission.

This counsel made the same argument before the United States Court of Appeals for the First Circuit in *Delta Traffic Service, Inc v. Transtop, Inc.*, 902 F.2d 101, 104-107 (1st Cir. 1990), and the Court there, before *Maislin*, referred the matter to the Commission for (A) a

determination as to the reasonableness of the rates, and (B) a determination of the reasonableness of the practices.

The First Circuit stayed the mandate on this decision until the decision in *Maislin* was entered, but, two weeks ago, on July 19, 1990, the Court entered it mandate and ordered the District Court to refer the matter to the I.C.C. on section "A" of its decision, that which referred to the reasonableness of the rates. (Copy attached)

In these cases, Judge Woodrow Wilson Jones, had referred the cases to the I.C.C. on the unreasonable practices issue, and the Commission entered orders on March 7, 1990 (Reiter) and March 13, 1990 (California Consolidated), finding the common carrier's *practices* unreasonable, but making no decision as to the reasonableness of the rates. The matter should therefore be referred back to the District Court for a referral to the I.C.C. for a decision on the reasonableness of the rate.

This would create a uniformity in treatment between the Circuit Courts.

Very truly yours,

Robert J. Gallagher
Attorney for:
California Consolidated
Enterprises, Inc.
and
Peter C. Reiter

RJG/mg
Enclosures

Supreme Court, U.S.
FILED
JUL 16 1992
OFFICE OF THE CLERK

No. 91-1496

In The

Supreme Court of the United States

October Term, 1992

IN RE: CAROLINA MOTOR EXPRESS, INC.,

Debtor

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the filed rate doctrine mandates that a shipper must pay the full tariff rate to a bankrupt carrier in a rate undercharge collection before the matter may be referred to the Interstate Commerce Commission (hereinafter "ICC" or "Commission") for a determination of the reasonableness of those rates.

PARTIES TO THE PROCEEDING

Petitioner, Peter C. Reiter, a broker of motor carrier transportation licensed by the ICC.

Petitioner, California Consolidated Enterprises, Inc., a broker of motor carrier transportation licensed by the ICC.

Respondent, Langdon M. Cooper, the Trustee for the Estate in Bankruptcy of Carolina Motor Express, Inc., a motor common carrier regulated under the Interstate Commerce Act.

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CITATIONS OF OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The decision of the Court of Appeals is *In Re Carolina Motor Express, Inc.*, 949 F.2d 107 (4th Cir. 1991).

The District Court decisions were not recommended for full text publication. They were printed as *Cooper v. California Consolidated Enterprises, Inc.*, 1989 Federal Carriers Cases at 83,464 and *Cooper v. Peter C. Reiter*, 1989 Federal Carriers Cases at 83,465.

The decision of the bankruptcy court is *Cooper v. California Consolidated Enterprises*, 84 Bankr. 979 (Bankr. W.D.N.C. 1988).

GROUND FOR JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(10), Title 28 of the United States Code. The decision of the Court of Appeals was entered on November 7, 1991. No petitions for rehearing were filed.

STATUTES INVOLVED

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. § 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the

rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 10762(a)(1) of the Interstate Commerce Act, 49 U.S.C. § 10762(a)(1) provides:

A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C. § 10701(a) provides that:

A rate, classification, rule or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.

Section 10701(e) of the Interstate Commerce Act, 49 U.S.C. § 10701(e) provides that:

In proceedings to determine the reasonableness of rate levels for a motor carrier or group of motor carriers, or in proceedings to determine the reasonableness of a territorial rate structure where rates are proposed through agreements authorized by section 10706(b) of this title, the Commission shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expense, including the operation of leased equipment and depreciation, plus a reasonable profit. The standards and procedures adopted by the Commission under this subsection shall allow the carriers to achieve revenue levels that will provide a flow of net income, plus depreciation, adequate to support prudent capital outlays, assure the repayment of reasonable level of debt, permit the rasing of needed equity capital, attract and retain capital in amounts adequate to provide a sound motor carrier transportation system in the United States, and take into account reasonable estimated or foreseeable future costs.

Section 11706(c)(2) of the Interstate Commerce Act, 49 U.S.C. § 11706(c)(2) provides that:

> A person must bring a civil action to recover damages under section 11705(b)(3) of this title [49 U.S.C. § 11705(b)(3)] within 2 years after the claim accrues.

STATEMENT OF THE CASE

In December 1986 Langdon M. Cooper, Trustee in Bankruptcy for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc. (hereinafter referred to as Trustee, Carolina, Mark respectively or collectively as Respondents), commenced this bankruptcy action in the United States District Court for the Western District of North Carolina, Shelby Division, against Carolina Consolidated Enterprises, Inc. (hereinafter referred to as CCE or Petitioner) (J.A. 14) and in January 1987 commenced another, related action in the same court against Peter C. Reiter (hereinafter referred to as Reiter or Petitioner) (J.A. 20). The Respondents sought to recover alleged undercharges based on tariffs on file with the ICC. See *Cooper v. California Consolidated Enterprises*, 84 Bankr. 979 (Bankr.W.D.N.C. 1988).

Reiter and CCE asserted various affirmative defenses, including allegations that Carolina was charging an improper rate, and denied that any additional amount was due and owing in connection with the transportation services Carolina provided. (J.A. 26 & 31). In March 1987 Reiter and CCE filed a Motion for Referral to the ICC with a supporting Memorandum arguing that the

question of the reasonableness and lawfulness of the rates involved in this proceeding should be referred to the ICC. (J.A. 36). Respondents filed a Memorandum of Law in Opposition, arguing that the questions of the reasonableness and lawfulness of the rate and unreasonable practice should not be referred to the ICC. (J.A. 41 & 56).

By Order dated March 25, 1987, Judge Marvin R. Wooten denied Reiter's and CCE's Motions for Referral. The parties conducted discovery and went to trial based on stipulated facts. Final judgments were entered on March 17, 1988, in favor of Respondents in connection with the undercharge claims in the principal amount of $13,795.73 and against CCE in the principal amount of $58,793.03. See *Cooper v. California Consolidated Enterprises, Inc.*, 1989 Federal Carriers Cases (CCH) at 83,464, and *Cooper v. Peter C. Reiter*, 1989 Federal Carriers Cases (CCH) at 83,465.

In March 1988 Reiter and CCE filed Notices of Appeal to the District Court concerning the Bankruptcy Court's judgments of March 17, 1988. Respondents memorialized their appeal of portions of the Bankruptcy Court's final judgements in their Notices of Cross-Appeal filed on or about April 7, 1988. Respondents appealed those portions of Judge Wooten's decisions denying prejudgment interest.

On April 25, 1989, Judge Jones entered Orders reversing the final Judgements of the Bankruptcy Court and referring to the ICC the issue whether the collection of the undercharges in these cases was an *"unreasonable practice."* Judge Jones also ordered that all proceedings be stayed pending the decisions of the ICC. Respondents filed Notices of Appeal to the United States Court of Appeals

for the Fourth Circuit on May 4, 1989. Reiter and CCE filed their complaints with the ICC on May 16, 1989.

By decisions handed down on March 7, 1990, the ICC upheld CCE's and Reiter's unreasonable practices defenses to the imposition of the filed rates. See *California Consolidated Enterprises, Inc. v. Carolina Motor Express, Inc.*, No. MC-C30166, and *Peter C. Reiter v. Carolina Motor Express, Inc.*, No. MC-C-301067. The ICC's decisions preceded this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759 (1990), which eliminated the unreasonable practice defense. CCE's and Reiter's cases were consolidated by Order of the Fourth Circuit on June 9, 1989.

After this Court handed down *Maislin, supra*, all parties filed letter briefs. (J.A. 59 & 65). Petitioners reasserted before the Fourth Circuit the issue of rate reasonableness, and requested that the proceedings be re-referred to the ICC for a determination of the rate reasonableness.

In decisions entered on November 7, 1991, the Fourth Circuit held that the Petitioners were required to pay the amount of the filed rate into the general funds of the bankruptcy estate before being allowed to refer the matter to the ICC for a determination whether the rates were reasonable and therefore lawful. The Court did conclude the issue of rate reasonableness had been preserved. See *In Re Carolina Motor Exp., Inc.*, 949 F.2d 107, 114 (4th Cir. 1991). Judge Hall, in a dissent, at 112, 114 held that the rate reasonableness issue should be re-referred to the ICC

upon a showing that its rate claims were "more than a bold, conclusory allegation of rate unreasonableness." *Id.*, at 114.

SUMMARY OF ARGUMENT

Petitioners have a right to have the issue of reasonableness of the rates referred to and determined by the ICC. If they must pay the disputed amounts first, their "right" is meaningless as they will never get their money back owing to Carolina's bankruptcy.

Respondents are bankrupt. If Petitioners win before the ICC, their standing is that of mere unsecured creditors.

ARGUMENT

A. The Decision of the Fourth Circuit Conflicts With Decisions of This Court.

This Court unequivocally declared that the shipper in a negotiated rates case was entitled to have the reasonableness of the rates sought to be collected, *Maislin, supra*, 110 S.Ct. at 2767, in the context of the carriers undercharge collection action. This declaration followed a long line of cases in which this Court had allowed the shipper to assert the unreasonableness of the filed rates as a defense against the collection of that rate. See *United States v. Western Pac. R. Co.*, 352 U.S. 59, 75 n.18 (1956) and *Pennsylvania R. Co. v. United States*, 363 U.S. 202, 203

(1913). A necessary corollary to that right is that, if the rates are found to be unreasonable, that finding will operate as a defense to the payment of the charges. If this were not a corollary, the reasonableness of the rates would be irrelevant, because the shipper would be required to pay the tariff rate, regardless of whether it was reasonable or not. As the carrier, in that case as well as in the instant proceeding, was in bankruptcy, a finding that the rate was unreasonable would only be of any effect if the shipper could assert it prior to paying the full tariff rate to the bankruptcy estate. As a mere unsecured creditor, the shipper could not reasonably expect any return from the bankruptcy estate if the rate collected were later determined to be unreasonable.

The Fourth Circuit has overlooked a significant condition for prepayment set forth in the Fifth Circuit's decision in *Southern Pac. Transp. Co. v. City of San Antonio*, 748 F.2d 266 (5th Cir. 1989), cert. den. 110 S.Ct. 3254 (1990). In *San Antonio*, the court held that the "carrier must be prepared to reimburse amounts later found to be unreasonable." *Id.*, at 274. Obviously the effectiveness of a subsequent reparations remedy is a condition precedent to requiring payment. Requiring a shipper to pay the amounts claimed to be due a defunct carrier where there is little or no prospect that a subsequent order of reparations will provide any effective remedy is absurd. The auditor/collection agency routinely retains about 70% of the amount collected off the top and the remaining 30% is dissipated before a reparations order becomes effective.

This result is proscribed by this Court's decisions[1] in *Western Pac., supra*, and *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 442 (1940).

Western Pac., supra, involved a dispute over (1) whether a tariff required a shipper to pay a specific rate, and (2) if the tariff required the payment of that rate, which was higher than the rate the shipper thought was applicable, whether the higher rate was "reasonable" as applied to the shipment. This Court held that the district court should not have found for either the shipper or carrier until the ICC determined both questions. *Western Pac.*, 552 U.S. 62-70, *Great Northern Ry. Co. v. Merchants Elev.*, 259 U.S. 285 at 291-292 (1922). See also *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 435-48 (1907).

Respondents in their Brief in Opposition to the Petition for Writ of Certiorari argue that, "The referring circuits have created a fiction which is not supported by the statute or Supreme Court law in an effort to bend over backwards to find relief for shippers presented with undercharge claims made by bankrupt carriers. It is important to note that when a carrier seeks to collect its filed tariff rate, neither the statute nor case law makes a distinction as to whether or not the carrier is solvent." (R. 12) Respondents then cite *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913). But there the court specifically noted that "the carrier [is] to retain what had been paid," *Id.* at 197, but here the "carrier" will retain nothing, and Petitioners will recover nothing

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[1] The Court has long held that "[w]henver a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission". *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

back from the bankruptcy estate, if the rates are found to be unreasonable.

Similarly, Respondents relied on *Crancer v. Lowden*, 315 U.S. 631, 636 (1942), which says that "if petitioner pays the judgment in this case and the Commission should in the still pending proceeding decide to modify the tariffs, *petitioner can obtain a complete remedy by way of reparation* (emphasis supplied).

That is not the case here. Respondents will admit and the Fourth Circuit acknowledged that if these "undercharges" are collected on the basis of the filed rate, and if the Commission, after referral, determines that the rate is unreasonable the Petitioners will get little or nothing back.

In *Delta Traffic Serv., Inc. et al. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990), Judge Steven G. Breyer comprehensively set forth why the court should stay the matter and refer it to the ICC when the reasonableness of the filed rate is at issue:

> As *Western Pacific* itself makes clear, where the "reasonableness" of the filed rate is at issue in a carrier's rate-collection suit, the court should refer the matter to the ICC and apply the ICC's result. Although the Supreme Court has also said, in strong terms, that a shipper *must* pay the filed rate, its cases are not in conflict on this point. In *Maxwell* [237 U.S. 96], where the Supreme Court announced the "filed rate doctrine" in absolute-sounding language ("Deviation [from the filed rate] is not permitted upon any pretext"), it followed that language with the sentence:

> Shippers and travelers are charged with notice of [the filed rate], and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable.*

Maxwell, 237 U.S. at 97 (emphasis added). Seventeen years later, the Court explained that a carrier must charge the filed rate (which the Court called the "legal" rate) to "all shippers alike," but that the "legal" rate was not necessarily "lawful," *Arizona Grocery Co. v. Atchison, T & S.F. Ry. Co.*, 284 U.S. 370, 384 (1932). A rate is "lawful," said the Court, only if it is "reasonable." *Id.* And a shipper may recover the difference between a high, filed ("legal") rate and a lower reasonable ("lawful") rate by bringing a suit against the carrier for reparations. *Id.*; *accord Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *cf.* 49 U.S.C. § 11705(b)(3) (creating cause of action for reparation) (original version at 49 U.S.C. § 304a(2) [repealed 1978]).

Because shippers may assert the unreasonableness of a rate as grounds for recovery in a reparation suit, courts ordinarily have permitted shippers to assert the same ground in a *defense* in a *carrier's suit* to collect the filed ("legal") rate. *See, e.g., Western Pacific, supra; United States v. Chesapeake & Ohio Ry. Co.*, 352 U.S. 202, 203 (1960) (dicta); *Union Pac. R.R. Co. v. Bay Area Shippers Consolidating Ass'n, Inc.*, 594 F.2d 1291, 1294 (9th Cir. 1979) (per curiam); *Chicago Rock Island & Pac. R.R. Co. v. Furniture Forwarders, Inc.*, 420 F.2d 385, 386-89 (8th Cir. 1970); *Indiana Harbor Belt R.R. Co. v. Industrial Scrap Corp.*, 672 F. Supp. 1041, 1042 (N.D. Ill. 1986);

Port of Bandon v. Oliver J. Olson & Co., 175 F. Supp. 736, 741-42 (D. Ore. 1959) (referring case to United States Maritime Board.) In such cases, the shipper may "ask for a stay of the court proceedings and then ask the Commission to declare the [higher rate] . . . unreasonable." *Western Transp.*, 682 F.2d at 1231; *cf. Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 223 (1966) (Shipping Act); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940) ("When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act".) This legal regime tends (1) to prevent carriers from favoring particular shippers by charging a lower-than-filed-tariff rate, (2) to protect shippers from having to pay a higher-than-reasonable rate, and (3) to permit the relevant expert body, the ICC, to make the relevant expert determination.

This Court has consistently held that where the reasonableness of a rate is raised, that issue should be referred to the ICC. If the rates are found to be unreasonable or found to be unlawful for some other reason, the shipper should not have to pay them. Upholding the Fourth Circuit means the demise of the rate reasonableness defense.[2] If disputed monies have to be paid first

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[2] See "High Court Grants Cert," *Traffic World* 18 (May 25, 1992), stating: "A ruling favoring Carolina would effectively

(Continued on following page)

when they will be unavailable for recovery, the shipper's affirmative defense means nothing.

Thus the decision of the court below is in direct conflict with the decision of this Court in *Maislin*, and is inconsistent with other rulings of this Court as well.

B. The Decision of the Fourth Circuit is in Conflict with All Other Courts of Appeal that Have Addressed This Subject.

The following Circuits permit referral, without the requirement that the undercharges be first paid:

1. *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990);

2. *Duffy v. BMC Indus., Inc.*, 938 F.2d 353 (2d Cir. 1991);

3. *Advance United Exp. v. Eastman Kodak Co.*, No. 91-1320, slip op. (5th Cir., June 26, 1992).

4. *Orr v. ICC*, 912 F.2d 119 (6th Cir. 1990)

5. *Orscheln Bros. Truck Lines, Inc. v. Zenith Elec. Corp.*, 899 F.2d 642 (7th Cir. 1990); also *Western Trans. Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982);

(Continued from previous page)

remove rate reasonableness as a viable defense in an undercharge case, said Joseph Steinfield, a Washington, D.C. attorney" [and attorney for Respondents]. "While in *Maislin* the bankruptcy trustees were at the edge of the cliff, now it is the shippers who are at the edge of the cliff," he said. "If they lose, their major defense is taken away from them."

6. *Atlantis Exp., Inc. v. Standard Transp. Serv.*, 955 F.2d 529 (8th Cir. 1992); and

7. *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir. 1990).

8. *Mill Truck Lines, Inc. v. Makita U.S.A.*, No. 91-55059 (9th Cir., June 7, 1992).

C. The Fifth Circuit Ruling that the Fourth Circuit Relied Upon Has Now Been Overruled.

The majority of the Panel said:

> In adopting this position, we join the Fifth Circuit, which has determined that "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission." *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d at 392; see also *Southern Pacific Transp. Co. v. San Antonio, Texas*, 748 F.2d at 274. We note that such a rule in no way forecloses the shipper from raising the issue of the reasonableness of the tariff rates. This issue could be raised either before or after the filing of the undercharge suit and could result in a reparations payment to the shipper by the carrier. See 49 U.S.C. § 10708(a)(1); *Regular Common Carrier Conference*, 793 F.2d at 379. In the meantime, however, the tariff as filed will have been enforced. While we recognize the judicial opinion on this point is not unanimous, *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990); see also *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982), we believe that the rule we adopt

> today best accords with the Supreme Court's longstanding insistence that "strict adherence to the filed rate . . . , despite its harsh consequences in some cases, is necessary to enforcement of the Act". *Maislin*, 497 U.S. at ___, 110 S.Ct. at 2769; see *Southern Pac. Transp. Co. v. Commercial Metals*, 456 U.S. 336, 343-44, 102 S.Ct. 1815, 1820-21, 72 L.Ed.2d 114 (1982); *Midstate Horticultural Co. v. Pennsylvania R.R. Co.*, 320 U.S. 356, 361, 64 S.Ct. 128, 130-31, 88 L.Ed 96 (1943). And we add that we consider it of considerable importance that the filed rate doctrine has resulted in the prevention of the secret and discriminatory negotiated freight rates which were the plague of common carriers in the past.

The Fifth Circuit in *Advance United Exp. v. Eastman Kodak Co.*, No. 91-1320, slip op. 11-14 (5th Cir., June 26, 1992) reversed its prior opinion in *Supreme Beef Processors v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), (also known as *In Re Caravan Express*) upon which the majority below relied, based on its analysis of this Court's *Maislin* decision (slip op. at 10). In doing so, the Court in *Advance United, supra* said:

> Having determined that Kodak was entitled to assert rate unreasonableness as a defense and that the applicable rate is yet to be determined, we are still confronted with the question of the appropriate forum for the determination of these issues. Kodak argues that the district court should have stayed the whole matter and referred the issues to the ICC. In the event the district court was not bound to refer the matter to the ICC, Kodak still seeks to stay enforcement of the district court's judgment until the ICC has

rendered its opinion on these issues that are now pending before it.

The general division of initial jurisdiction between the courts and the ICC is defined by the "primary jurisdiction doctrine, which requires that

> issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the act" be submitted initially to the Commission for determination. Therefore, a district court trying a case under the Interstate Commerce Act *must*, if presented with such an issue, stay its proceedings and refer the case to the Commission."

City of New Orleans v. Southern Scrap Material, 704 F.2d 755, 758 (5th Cir. 1983) (emphasis added) *quoting ICC v. Atlantic Coast R.*, 383 U.S. 576, 579 (1966). Where the reasonableness of a tariff rate is at issue, the primary jurisdiction doctrine compels that "there *must* be preliminary resort to the Commission." *Southern Pacific Transport Co. v. City of San Antonio, Texas*, 748 F.2d 266, 272 (5th Cir. 1984) (emphasis added) *quoting Great Northern Ry. v. Merchants Elevator*, 259 U.S. 285, 291 (1922). Furthermore, when questions of construction and reasonableness of a tariff are "so intertwined that the same factors are determinative of both issues, then it is the Commission which *must* first pass on them." *Coca-Cola Co. v. Atchison, T. & S. F. Ry. Co.*, 608 F.2d 213, 220 (5th Cir. 1989) (emphasis added) *quoting U.S. v. Western Pac. R.R.*, 352 U.S. 59 (1956).

> Clearly, the primary jurisdiction doctrine mandates that the defense of unreasonableness initially be committed, according to the usual procedures under 28 U.S.C. § 1336(b), to the ICC for its review and decision. Upon return of the referred issues from the ICC, the district court should then accord appropriate review. *See Coca-Cola v. Atchison, Topeka and Santa Fe. R. Co.*, 608 F.2d 213, 218 (5th Cir. 1979); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-617 [sic] (1966).

Since the Fourth Circuit relies so heavily on the reasoning contained in *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), cert. denied 493 U.S. 803, the reversal by the Fifth Circuit leaves the Fourth Circuit decision completely unsupported and hopelessly irreconcilable with the positions of all other Courts of Appeal that have addressed this subject.

D. The Dissent in Case Below Correctly Expressed the Law.

As noted in Judge Hall's dissent:

> The majority finds, I agree, that the three appellant-shippers have preserved the issue of rate reasonableness. The question remaining after *Maislin* is whether the shippers should be allowed to dispute the reasonableness of the rates in the context of the undercharge action, or whether their sole recourse should be an independent reparations action under 49 U.S.C. § 11705(b)(3). For a variety of reasons, I believe the former path is correct.
>
> I believe the sounder position is set forth in *Delta Traffic Service v. Transtop, Inc.*, 902 F.2d at

101, 104-107 (1st Cir. 1990). In addition to demolishing the legal basis for the non-referral rule adopted by the Fifth Circuit in *Supreme Beef Processors*, the First Circuit explains the historical basis for the referral and stay rule which it believed was "universally accepted" until *Supreme Beef Processors* was discovered. *Id.* at 105. to the First Circuit's analysis I can only add the names of other post-*Maislin* decisions that have followed the referral and stay rule. *Duffy v. BMC Industries*, 938 F.2d 353 (2nd Cir. 1991); *Horn's Motor Express v. Harrisburg Paper Co.*, 765 F.Supp. 211 (M.D.Pa 1991); *Overland Express v. International Multifoods*, 765 F.Supp. 1386 (S.D.Ind. 1990); *Oneida Freight v. Ormon Shops*, 126 B.R. 431 (D.N.J. 1991); *In re Sharm Express, Inc.*, 122 B.R. 999 (D.Minn. 1991).

(Footnotes omitted.)

E. The Procedure Mandated by the Court of Appeals "Stands the Matter on its Head."

The Fourth Circuit maintains that a shipper's only remedy is to pay the undercharges and to assail the reasonableness of the rates by an action for reparations, pursuant to 49 U.S.C. § 11705(b)(3). But, such a course could leave a shipper with no remedy at all. First, the ICC has no independent reparation authority in motor carrier cases; an action first must be initiated in court, but, with a bankrupt carrier any such suit will be barred by the Bankruptcy Court's automatic stay order. Further, many times any action for reparations would be barred by the two-year statute of limitations, 49 U.S.C. § 11706(c)(2). *Mammoth Plastics v. National Classification Bd.*, 341 I.C.C.

15, 17-18 (1972); *Informal Procedure for Determining Reparations*, 335 I.C.C. 403, 413 (1969).

The ICC foresaw the procedural trap set out for shippers in *Glama Dress Co. v. Mid-South Transports*, 335 I.C.C. 586 (1969), a proceeding stemming from a carrier's action for undercharges. The ICC, 355 I.C.C. at 589, explained:

> As indicated, complainant here has filed a counterclaim in the pending court action raising issues of the reasonableness and lawfulness of the rates. Defendants take the position that the [statute of limitations] does not permit shippers to "assert unreasonableness as a defense in carrier suits to recover applicable tariff rates." Under this interpretation of the involved statutory provisions a shipper who has paid what it considers the proper rate or charge would be foreclosed from a possibly meritorious defense in a court action anytime the carrier sues for undercharges after the 2-year period specified in [49 U.S.C. § 11706(c)(2)] has run before the 3-year period specified in [49 U.S.C. § 11706(a)] . . . We believe that the same rationale [enunciated in *United States v. Western Pac. R. Co.*, 352 U.S. 59, 72 (1956)] should be applied here and conclude that the Commission has authority upon complaint of a shipper to make an administrative determination of the past unreasonableness and lawfulness of the rates sought to be charged on the shipments which are the subject of the pending court action.

More recently the ICC recognized that only by allowing Petitioners to assert the rate reasonableness defense to Respondents undercharge claims before payment are

Petitioners able to secure from the ICC a meaningful determination of the reasonableness of the rates as applied to their shipments. *Ex Parte No. MC-177 (Sub-No. 2) Petitions for Issuance for Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61 ("*Rate Reasonableness Statement*").

The dissenting opinion in *In re Carolina Motor Exp. Inc.*, 949 F.2d at 113 n.3 confirms the argument as to why the Fourth Circuit's procedure is convoluted:

> I believe this stands the matter on its head. It is the bankruptcy trustee who is making a claim against the shipper; the shipper, in turn, has asserted the defense of "unreasonable rate." If the shipper is correct, the filed rate is "not enforceable," *Id.*, and the trustee should receive nothing more than the unpaid portion of the reasonable rate. The majority, however, would give automatic judgment to the trustee and make the shipper pay a possibly unreasonable, unlawful and unenforceable rate. After this rate is paid, the shipper is left with a claim against the estate; even if the court estimates the value of this claim as the full difference between the negotiated rate and the filed rate, the shipper can only receive a pro rata share with the other unsecured creditors, an amount likely to be substantially less than the "claim" itself.

This approach is far more practical and promotes judicial economy while at the same time assuring a just result.

Moreover, as ploys to collect additional sums from shippers multiply, the courts need the benefits of the

ICC's expertise concerning the reasonableness and lawfulness of the charges sought to be collected before shippers are required to make payment. For example, the trustees and agents of the defunct motor carriers have been instituting actions all over the country to collect amounts equal to or, in some instances, greater than the *filed* rate originally billed and paid on the asserted ground that the originally billed filed rate is now considered by the collection agent to have been unlawful.[3] Courts at various levels have declined to refer such issues to the ICC sometimes even in the face of a request for referral by the ICC itself based on the holding of the majority of the panel of the court below. See *Lloyd T. Whitaker, Chapter 7 Trustee for Olympia Holding Corp. v. Younkers, Inc.*, U.S. Bkr. Court for the Middle District of Florida, Adv. No. 91-448, decision denying referral dated June 15, 1992. (See attached Addendum "A").

In the *Rate Reasonableness Statement*, the ICC discussed the criteria it traditionally used for determining the reasonableness of rates. The ICC's *Rate Reasonableness Statement* was referred to with apparent approval by the court in requiring referral of a rate reasonableness issue in *Atlantis Exp., Inc. v. Standard Transp. Serv., Inc.*, 955 F.2d 529, 536 (8th Cir. 1992).

---

[3] The most frequently asserted ground is that the originally billed filed discount rate, which the ICC permitted to be filed and published by shipper code to further computerization, in their view now violates the filing and publication requirements of the Interstate Commerce Act. Of course, the ICC by the express terms of the Act, 49 U.S.C. § 10762(b)(1), is made the arbiter of filing and publication under the Act.

From the inception of their regulation, now more than a century ago, the rates of common carriers were required to be just and reasonable, and any unjust and unreasonable rate was declared to be unlawful. 49 U.S.C. § 10701(a). Although the reasonableness of a rate can be challenged in many ways, the rate's effect upon the movement of traffic certainly is a measure of its reasonableness. A rate too high to permit traffic to move is *per se* unreasonable. The theory was explained in Harper, *Transportation in America*, 2d ed. 176 (1982), as follows:

> "In pricing transportation services, there is an upper limit on how high the rate on a given segment of traffic can be. This ceiling is often referred to as the *value of service* to the user, meaning that there is a point beyond which the rate is too high for what the transportation service is worth to the user. The value of service is really a measure of the elasticity of demand for the service and, usually, as the rate is increased, the volume of traffic shipped decreases."

The ICC in *Passenger Fares, District of Columbia, Nearby Virginia*, 256 I.C.C. 769, 783 (1944), *mod.*, 280 I.C.C. 37 (1951), *aff'd sub nom., United States v. Capital Transit Co.*, 325 U.S. 357 (1945), noted, "It is elementary that value of service, ability to pay, or what the traffic will bear, are elements properly entering into the fixation of reasonable transportation charges."

The ICC applied the principle in *Penick & Ford v. Director General*, 80 I.C.C. 152 (1923), in which it found that the application of regular molasses rates to the movement of black-strap molasses was unreasonable, noting that "[t]he regular molasses rates are in many

instances too high to move blackstrap in commercial quantities." *Id.* at 156. The ICC concluded, "Though by no means the sole consideration, the rate level necessary to move a commodity is an element to be weighed in determining a reasonable rate thereon." *Id.*

Similarly, in *O.C. Field Gasoline Corp. v. Nevada N. Ry. Co.*, 258 I.C.C. 350, 353 (1944), the ICC observed, "The fact that the . . . rate charged impeded the freedom of movement tends to prove that it was unreasonable." And in *Southern Cement Rates*, 132 I.C.C. 427, 446 (1927), the ICC said, "[T]he circumstances that rates impede freedom of movement tends to show that they are unreasonable . . ." *See also Richmond Mica Corp. v. Atlantic Coast Line R. Co.*, 167 I.C.C. 647, 648 (1930).

Therefore, a threshold question is whether the rate sought to be collected in an undercharge action was the one that permitted the traffic to move. If it was too high to move significant amounts of traffic, it was presumptively unreasonable and, therefore, unlawful.

Whether the rates sought to be collected in this proceeding would ever have moved the traffic during the time these shipments moved or whether the rate was too high or what were the rates of competing carriers, *inter alia*, are unresolved issues of fact in this case. Therefore, the reasonableness of these rates must be determined by the ICC, under its criteria.

CONCLUSION

Petitioners should have the right to have their defense of the unreasonableness of the rates be re-referred to the ICC. Doing less simply eliminates a valid defense which this Court made clear in *Maislin*, among other decisions, that Petitioners are entitled to raise. Petitioners risk forfeiture of unlawful overcharges if they have to pay the disputed sums and then reassert them following an ICC determination of their unlawfullness, as unsecured creditors against the bankruptcy estate.

Accordingly, the Court should reverse the Fourth Circuit and, as suggested by Judge Hall, remand to the District Court with instructions to refer the proceeding to the ICC for determination of rate reasonableness and any other defenses within the ICC's primary jurisdiction.

Respectfully submitted,

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IN THE UNITED STATES
BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION.

CASE NOS. 90-4195-BKC-3P7 and
90-4223-BKC-3P7
Jointly Administered

Adv. No. 91-448

In re

OLYMPIA HOLDING
CORPORATION, a/k/a P-I-E
Nationwide, Inc., et al.

Debtors.

LLOYD T. WHITAKER AS
CHAPTER 7 TRUSTEE FOR
OLYMPIA HOLDING
CORPORATION, a/k/a P-I-E
Nationwide, Inc.,

Plaintiff,

v.

YOUNKERS, INC., a Delaware
corporation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION

Upon the Findings of Fact and Conclusions of Law separately entered, it is

ORDERED:

Defendant's Motion for Referral to the Interstate Commerce Commission is denied.

DATED: June 15, 1992 in Jacksonville, Florida.

/s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge

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IN THE UNITED STATES
BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION.

CASE NOS. 90-4195-BKC-3P7 and
90-4223-BKC-3P7
Jointly Administered

Adv. No. 91-448

In re

OLYMPIA HOLDING
CORPORATION, a/k/a P-I-E
Nationwide, Inc., et al.

Debtors.

LLOYD T. WHITAKER AS
CHAPTER 7 TRUSTEE FOR
OLYMPIA HOLDING
CORPORATION, a/k/a P-I-E
Nationwide, Inc.,

Plaintiff,

v.

YOUNKERS, INC., a Delaware
corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This adversary proceeding came to be heard upon the Motion of Defendant for Referral to the Interstate

Commerce Commission. A hearing was held on December 13, 1991. Upon the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

Debtor was both a motor common and motor contract carrier operating in interstate commerce pursuant to the authority of the Interstate Commerce Commission ("ICC").

Debtor filed tariffs with the ICC which provided for a Class 70 exception rate with a discount of 55-59% off of that Class 70 exception rate. Subsequent to the filing of such tariff rate, debtor filed tariff item 721 stating that any customer not paying its bill within 60 days of the date of the invoice would lose its class exception and its discount ("loss-of-discount tariff").

Debtor filed a chapter 11 petition on October 16, 1990. Lloyd T. Whitaker was appointed as chapter 11 trustee on December 26, 1990. The case was subsequently converted to chapter 7 on March 11, 1991, and Lloyd T. Whitaker was appointed the chapter 7 trustee.

Defendant, as shipper, and Debtor, as common carrier, did business together on a tariff basis for a substantial amount of time.

In late November and early December of 1990, a dispute arose between debtor and defendant. Defendant claimed approximately $14,000.00 against debtor for goods lost or damaged in shipment and withheld payment on the shipping bills.

Plaintiff conducted an audit of debtor's records and determined that the original amounts billed were not properly rated in accordance with the filed tariff. Accordingly, the plaintiff sent new bills to defendant which did not include the class exception or the discount and which were rerated at the full class rates. The rerated bills represented an increase in rates from the original bills of at least 65-69%. Plaintiff based the change on the loss-of-discount tariff. Defendant refused to pay the rerated bills.

On June 20, 1991, plaintiff filed this adversary proceeding seeking turnover of property and a money judgment for $31,516.48, based on the rerated bills. Defendant filed an answer raising the defenses of set-off and unreasonable rates and asked that the proceeding be referred to the ICC. With plaintiff's consent, defendant later filed an amended answer asserting further defenses, as well as a counterclaim for damages.

Defendant contends that 1) the tariff rates on which plaintiff relies are inapplicable to the shipments in question; 2) if the rates do apply, they are unreasonable and unlawful under 49 U.S.C. § 10701(a); 3) the tariff rules violate 49 U.S.C. 10761 and ICC regulations contained in 49 C.F.R. Part 1320; and 4) some sums sought by plaintiff were not demanded until after the requisite time periods of 49 C.F.R. parts 1320.2(e)(2) and (3), 1320.2(g)(2)(vi).

Plaintiff, on the other hand, argues that 1) this Court does not have jurisdiction under 28 U.S.C. § 1336(b) to make a referral to the ICC; 2) referral is not necessary because defendant must pay the filed rate and then seek reparations; 3) the loss-of-discount tariff does not violate

ICC credit regulations, and 4) violation of the credit regulations is not a defense to enforcement of filed tariff rates.

Thus, the Court must initially determine whether it has the authority under 28 U.S.C. § 1336 to refer any issue to the ICC. If the Court does have such power, the question arises as to whether the issues raised in this proceeding must be resolved by the administrative agency and if so, at what point in time must such a determination be made.

Conclusions of Law

A. Referral Power

Congress provided in 28 U.S.C. § 1334(b) that " . . . district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Under 28 U.S.C. § 157(a), the district court may provide that any or all cases or proceedings arising under title 11 shall be referred to the bankruptcy judges. The United States District Court for the Middle District of Florida has entered such a referral order. Rule 104, Local rules for the Middle District of Florida. Accordingly, this bankruptcy case and this adversary proceeding have been referred to this Court.

The district court's jurisdiction to refer issues to the ICC is embodied in 28 U.S.C. § 1336, which provides in relevant part:

> (a) Except as otherwise provided by Act by Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.
>
> (b) When a district court or the United states [sic] Claims Court refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

Under the district court's referral order, the bankruptcy court is sitting in the adversary proceeding as a unit of the district court. Thus, for purposes of 28 U.S.C. § 1336, "district court" includes the bankruptcy court. *Railway Labor Executives' Assn v. ICC*, 894 F.2d 915 (7th Cir.) *reh'g denied*, 908 F.2d 127 (7th Cir. 1990); *In re Total Transportation, Inc.*, 84 B.R. 590 (D.Minn. 1988). Accordingly, this Court has jurisdiction to refer the issues at hand to the ICC.

It should also be noted that although his brief argues to the contrary, plaintiff's counsel stated during the hearing that this Court has "the power to refer matters to any federal agency, including the ICC." (Transcript at page 9).

B. Primary Jurisdiction

The doctrine of primary jurisdiction serves to ensure that the courts provide administrative agencies charged with specific regulatory responsibilities the appropriate

opportunity to fulfill such duties. The United States Supreme Court explained the doctrine:

> "Primary jurisdiction," . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . .
>
> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

United States v. Western P. R. Co., 352 U.S. 59, 63-64 (1956) (citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940)). The Court then indicated that the doctrine was intended to promote uniformity and consistency, as well as provide expert and specialized knowledge when resolving administrative questions. *Id.*; *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

The issues in this proceeding primarily involve the validity of the loss-of-discount tariff and the reasonableness of the filed rate. In *Western P. R. Co.* the Court also indicated that where the issue merely involved construction of a tariff, courts could decide it as an issue "solely of law." *Western P. R. Co.*, 352 U.S. at 66. Thus, as long as discretion in technical matters requiring a knowledge of intricate facts is not being exercised, a court may decide the issues.

The Court of Appeals for the Seventh Circuit has held that " . . . courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation, rather than reasonableness." *Interstate Commerce Com. v. All-American, Inc.*, 505 F.2d 1360, 1363 (7th Cir. 1974).

The defendant contends that the loss-of-discount tariff if unlawful because it does not comply with ICC credit regulations. Plaintiff argues that the credit regulations are irrelevant and that the loss-of-discount tariff is merely a condition precedent to participation in the discount programs. Accordingly, the issue involves either a violation of regulations or tariff interpretation, both of which are within the original jurisdiction of this Court.

The Supreme Court has indicated that jurisdiction to determine the reasonableness of rates is vested with the ICC: " 'The [Interstate Commerce] Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate.' " *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, ___, 110 S.Ct. 2759, 2767 (1990) (quoting *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 384 (1932)). The question of the reasonableness of debtor's filed rates should be properly decided by the ICC.

Both the parties admit that the ICC is the expert body vested with the authority to resolve a legitimate issue of rate reasonableness. However, the parties differ on their assessment as to when such a determination is properly made.

C. Rate Reasonableness

Currently the Circuit Courts of Appeal are split on the issue of when the ICC should determine whether a filed rate is reasonable. The first, third, seventh, and eighth circuits adhere to the stay and refer approach. *Delta Traffic Service, Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990); *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd*, 919 F.2d 134 (3rd Cir. 1990); *Western Transportation Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982); *Atlantis Express, Inc. v. Standard Transp. Services, Inc.*, 955 F.2d 529 (8th Cir. 1992). Those circuits hold that the judicial proceeding must be stayed and the issue of rate reasonableness referred to the ICC for determination. In so holding the cases necessarily recognize rate reasonableness as a defense to a proceeding to collect the filed rate.

The fourth and fifth circuits, on the other hand, hold that rate reasonableness cannot be used as a defense. *In re Carolina Motor Express, Inc.*, 949 F.2d 107, 110-11 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3779 (1992); *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 391-92 (5th Cir. 1989). The cases indicate that the shipper must pay the filed rate and then the exclusive remedy for recovering excess charges is through the statutory reparations action. At that time the ICC would determine the reasonableness of a given rate.

Neither the District Court for the Middle District of Florida nor the Court of Appeals for the Eleventh Circuit has spoken on this issue. This Court finds that the rationale behind the holdings in the fourth and fifth circuits is

more persuasive and, thus, holds that rate reasonable is not properly asserted as defense to collection of the filed rate.

Prior to the enactment of the Motor Carriers Act of 1935, common law recognized a shipper's right to restitution for unreasonable charges. *Arizona Grocery Company v. Atchison, T. & S. F. R. Company*, 284 U.S. 370 (1932); *Arkadelphia Milling Company v. St. Louis S. R. Co.*, 249 U.S. 134 (1919). Subsequent to such enactment, it was assumed that the savings clause, 49 U.S.C. § 316(j),[1] provided the basis for a continued right of restitution.

However, the United States Supreme Court subsequently held that the restitution remedy afforded shippers under common law had not survived. *T. I. M. E. Incorporated v. United States*, 359 U.S. 464 (1959). In holding that a shipper could not challenge the reasonableness of a rate in post-shipment litigation, the Court left shippers without any remedy when a filed rate was found to be unreasonable.

Congress recognized the problem and enacted 49 U.S.C. § 304a in 1965 in an effort to provide shippers with relief. Section 304a provided that shippers could recover overcharges by filing an action at law for "reparations" within a certain time period. The section specifically defined reparations as damages resulting from charges based on a tariff found to be unreasonable by the ICC. Section 304a has since had recodified as 49 U.S.C.

---

[1] Section 316(j) provides: "Nothing in this section shall be held to extinguish any remedy or right of action; not inconsistent herewith."

§ 11705(b)(3) and 11706(c)(2), which read, in relevant part:

> § 11705. Rights and remedies of persons injured by certain carriers.
>
> (b)(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.
>
> § 11706. Limitation on actions by and against common carriers.
>
> (c)(2) A person must begin a civil action to recover damages under section 11705(b)(3) of this title within 2 years after the claim accrues.

The statute, by its terms, provides a procedure through which a shipper may challenge a filed rate and recover "reparations" for excessive amounts paid. The scheme does not provide for the use of the right to reparations as a defense. The sole and exclusive remedy provided is a post-payment challenge to the rate reasonableness accompanied by a request for reparations. *In re Carolina Motor Express, Inc.*, 949 F.2d 107, 110-11 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3779 (1992); *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 391-92 (5th Cir. 1989); *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082, 1085 (5th Cir. 1974); *Lifschultz Fast Freight, Inc. v. Rainbow Shops, Inc.*, 784 F.Supp. 89, 93 (S.D.N.Y. 1992) ("The very characterization of the remedy in the statute – 'reparations' – suggests a rule of pay first and sue later.").

Rejection of reasonableness as a defense may lead to a harsh result, but it is the result dictated by the terms of the statute. In addition, it serves to support the filed rate doctrine espoused by the United States Supreme Court:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it. . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & N. R. Co. v. Maxwell, 237 U.S. 94, 97 (1915). The Supreme Court recently reiterated the importance of the filed rate doctrine in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, ___, 110 S.Ct. 2759, 2766-67 (1990).

By refusing to allow the defendant to assert rate reasonableness as a defense, the Court not only adheres to the statutory scheme, but also protects the filed rate doctrine and its underlying policy of discouraging price discrimination.

D. Conclusion

This Court has the jurisdiction to refer the issues raised to the ICC, but concludes that such referral is inappropriate at this time. Although the ICC has primary jurisdiction over rate reasonableness questions and is the

proper body to make such determinations, rate reasonableness is not a defense to a proceeding to collect the filed rate. Defendant's sole remedy for excessive charges is through the statutory reparations action.

A separate order denying defendant's motion for referral to the ICC will be entered.

DATED: June 15, 1992 in Jacksonville, Florida.

/s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge

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(8)

Supreme Court, U.S.
FILED
SEP 2 1992
OFFICE OF THE CLERK

No. 91-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IN RE: CAROLINA MOTOR EXPRESS, INC.,
Debtor

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR
CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

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September 2, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the Interstate Commerce Act allow a shipper to ignore 49 U.S.C. Section 10761, delaying payment of the filed rate for years, by asserting rate reasonableness as a defense to a carrier's action for its transportation charges?

PARTIES TO THE PROCEEDING BELOW

Appellants in the United States Court of Appeals for the Fourth Circuit and Respondents herein are Langdon M. Cooper, Trustee for the estate of Carolina Motor Express, Inc. (a former motor common carrier regulated by the Interstate Commerce Act), and Mark & Associates of North Carolina, a rate auditing firm hired by the Trustee, pursuant to Court Order, to audit Carolina Motor Express, Inc.'s freight bills.

Appellees in the United States Court of Appeals for the Fourth Circuit and Petitioners herein, are California Consolidated Enterprises, Inc., a former broker of motor carrier transportation which had been licensed by the Interstate Commerce Commission * and Peter C. Reiter, a sole proprietor, and a broker of motor carrier transportation licensed by the Interstate Commerce Commission.

---

* By decision MC-164423 (Sub 3-R1R), served June 20, 1990, after prior notice that its authority would be revoked for failure to maintain a surety bond, California Consolidated Enterprises, Inc. requested and received revocation of its authority to conduct operations as a broker pursuant to 49 U.S.C. Section 10925(b). *See* Appendix A hereto at 1a-6a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1496

IN RE: CAROLINA MOTOR EXPRESS, INC.,
Debtor

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR
CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinions below are adequately set forth in the Brief For The Petitioner.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief For The Petitioner.

STATUTES INVOLVED

In addition to the statutes set forth in the Brief For The Petitioner the following statutes are involved:

The Tucker Act, 31 U.S.C. Section 3726 provides:

> (a) A carrier or freight forwarder presenting a bill for transporting an individual or property for the

United States Government may be paid before the Administrator of General Services conducts an audit, in accordance with regulations that the Administrator shall prescribe. A claim under this section shall be allowed only if it is received by the Administrator not more than 3 years (excluding time of war) after the later of the following dates:

(1) accrual of the claim;

(2) payment for the transportation is made;

(3) refund for an overpayment for the transportation is made; or

(4) a deduction under subsection (b) of this section is made.

(b) Not later than 3 years (excluding time of war) after the time a bill is paid, the Government may deduct from an amount subsequently due a carrier or freight forwarder an amount paid on the bill that was greater than the rate allowed under—

(1) a lawful tariff on file with the Interstate Commerce Commission, the Secretary of Transportation with respect to foreign air transportation (as defined in the Federal Aviation Act of 1958 [49 USCS Appx. Sections 1301 et seq.]) Civil Aeronautics Board, the Federal Maritime Commission or a State transportation authority; or

(2) sections 10721-10724 of title 49 [49 USCS Sections 10721-10724] or an equivalent arrangement or an exemption.

(c) Expenses of transportation audit contracts and contract administration shall be financed from overpayments collected from carriers on transportation bills paid by the Government and other similar type refunds at not to exceed 40 percent of such collections annually. Payment to any contractor shall not exceed 50 percent of the overpayments identified by any contract audit.

(d) At least annually, and as determined by the Administrator, after making adequate provision for

expenses of refunds to carriers, transportation audit contracts, and contract administration authorized in subsection (c), the balance of the overpayments collected by the General Services Administration shall be transferred to miscellaneous receipt of the Treasury. A report of receipts, disbursements, and transfers (to miscellaneous receipts) pursuant to this section shall be made annually in connection with the budget estimates by the Director of the Office of Management and Budget and to the Congress.

(e) The Administrator may delegate any authority conferred by this section to another agency or agencies if the Administrator determines that such a delegation would be cost-effective or otherwise in the public interest.

(f) Under regulations the head of an agency prescribes that conform with standards the Secretary of the Treasury and the Comptroller General prescribe jointly, a bill under this section may be paid before the transportation is completed notwithstanding section 3324 of this title when a carrier or freight forwarder issues the annual document for the transportation. Payment for transportation ordered but not provided may be recovered by deduction or other means.

(g) (1) A carrier or freight forwarder may request the Comptroller General to review the action of the Administrator if the request is received not later than 6 months (excluding time of war) after the Administrator acts or within the time stated in subsection (a) of this section, whichever is later. (2) This section does not prevent the Comptroller General from conducting an audit under chapter 35 of this title.

Section 10708(a)-(c) of the Interstate Commerce Act, 49 U.S.C. Section 10708(a)-(c) provides:

(a) (1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule or practice immedi-

ately, on its own initiative or on application of an interested party when—

(A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier under this subtitle; or

(B) a new or reduced rate or rule or practice that causes a reduction of a rate is filed with the Commission by a contract carrier under this subtitle.

(2) The Commission must give reasonable notice before beginning a proceeding under this section but may act without allowing an interested carrier to file an answer or other formal pleading in response to its decision to begin the proceeding. The Commission may take whatever final action on a rate, classification, rule or practice under this section, after a full hearing (whether completed before or after the rate, classification, rule, or practice goes into effect), as it could in a proceeding begun after a rate, classification, rule, or practice became effective.

(b) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect by (1) delivering to each affected carrier, and (2) filing with the proposed rate, classification, rule, or practice, a statement of reasons for the suspension. If the Commission does not take final action during the suspension period, the proposed rate, classification, rule, or practice is effective at the end of that period. However, if an increase in a rate for, or related to, transportation of property by an express, sleeping car, or pipeline carrier becomes effective under this subsection, the Commission may require the interested carrier to account for all amounts received under it and specify by whom and on whose behalf those amounts were paid. When the Commission takes final action, it may require the carrier to

refund, with interest, to the persons on whose behalf those amounts were paid, the part of the increased rate found to be in violation of this subtitle.

Section 11705 of the Interstate Commerce Act, 49 U.S.C. Section 11705 provides in pertinent part that:

(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

(b)(1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] or a freight forwarder is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title [49 USCS §§ 10761 et seq.].

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.] is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title [49 USCS §§ 10521 et seq. or 10561 et seq.] or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c)(1) a person may file a complaint with the Commission under section 11701(b) of this title [49 USCS § 11701(b)] or bring a civil action under subsection (b)(1) or (2) of this section to enforce

liability against a comon carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.]. A person may begin a proceeding under section 10704 or 10705 of this title [49 USCS § 10704 or 10705] to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title [49 USCS § 11701(b)].

COUNTERSTATEMENT OF THE CASE

Petitioner California Consolidated Enterprises, Inc. (hereinafter "CCE" or "Petitioner") was a broker of motor carrier transportation until its authority was revoked by the Interstate Commerce Commission (hereinafter "Commission"). It arranged transportation services by motor carriers operating under the authority of the Interstate Commerce Act (hereinafter the "Act"), 49 U.S.C. Section 10101 et seq. (1982), for the shipping public. It provided these services pursuant to a broker's license issued to it by the Commission. During 1984 to 1986 CCE tendered freight to Carolina Motor Express, Inc. (hereinafter "CMX") for transportation in interstate commerce.

Petitioner Peter Reiter (hereinafter "Reiter" or "Petitioner") is similarly a broker of motor carrier transportation, licensed by the Commission to perform these services. Reiter also tendered freight to CMX during 1984 to 1986 for transportation in interstate commerce.

The bankruptcy proceedings which have lead to this dispute, commenced with the filing in 1986 of a petition under Chapter 11 of the United States Bankruptcy Code (hereinafter "Bankruptcy Code"), 11 U.S.C. Section 101 et seq. (1978), by CMX, a motor common carrier. This was later converted to a petition for relief pursuant to Chapter 7 of the Bankruptcy Code. Langdon M. Cooper was appointed Trustee (hereinafter "Trustee") of the estate while the proceedings were still under Chapter 11.

As a motor common carrier, CMX had various tariffs on file with the Commission. Mark & Associates of North Carolina (hereinafter "Mark & Associates"), is a rate auditing company hired by the Trustee, pursuant to Court Order, to audit CMX's freight bills. Mark & Associates audited the freight bills for shipments transported by CMX for Petitioners. The audit for CCE's shipments revealed freight undercharges owed to CMX in the amount of $58,793.03. The audit for Reiter's shipments revealed freight undercharges in the amount of $13,795.73. The Trustee and Mark & Associates (collectively referred to as "Respondents") brought actions to collect these amounts in the United States Bankruptcy Court for the Western District of North Carolina. (Joint Appendix [1] at 14 and 20).

The record reflects that this is a typical "negotiated rates case" of the type reviewed by this Court in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 111 L.Ed. 2d 94, 110 S.Ct. 2759 (1990). CMX agreed with Petitioners to handle their freight at negotiated rates not contained in CMX's published tariff. *See* Petition For Writ of Certiorari, Appendix at 4a. The Petitioners did not dispute the applicability of CMX's filed rates, nor did they claim that CMX's rates were in any way ambiguous or subject to differing interpretations. Rather, the Petitioners defenses to the actions were based solely upon the fact that each had relied upon CMX's agreement to handle their freight at the agreed upon rates without regard to whether or not the rates were filed by CMX with the Commission. The bankruptcy court found such reliance unreasonable, but even if it were reasonable, because the filed-rate doctrine precluded Petitioners' assertion of equitable defenses to the carrier's undercharge claims, the

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[1] Hereinafter referred to as "J.A."

[2] *National Indus. Transp. League—Petition to Institute Rate-making On Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986); *Petition to Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 5 I.C.C. 2d 623 (1989).

Trustee was entitled to judgment regardless of the conduct of CMX. 84 B.R. 979 (Bankr. W.D.N.C. 1988).

On appeal, the district court relying on the Commission's *Negotiated Rates* policy statement, Ex Parte No. MC-177,[2] reversed the final judgments of the bankruptcy court and referred to the Commission the question of whether the Trustee's collection of the undercharges would amount to an unreasonable practice. Respondents appealed the district court decision. Thereafter this Court issued its decision in *Maislin* striking down the Commission's policy statement in *Negotiated Rates*.

Pursuant to *Maislin* the Fourth Circuit vacated the district court's reversal of the bankruptcy court's judgment and remanded these cases to the district court with instructions that the judgment of the bankruptcy court be reinstated. 949 F.2d 107 (4th Cir. 1991). In its decision the Fourth Circuit agreed with the Fifth Circuit view expressed in *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 385 (5th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990),[3] that allegations of rate reasonableness may not be considered by a court, nor should a court interfere with the collection of a filed rate by staying the court action pending Commission review of the reasonableness of the filed rates. Instead, the Fourth Circuit ordered that the district court enforce the unambiguous tariff of CMX. Petitioners initially filed a Petition for Writ of Certiorari on February 4, 1992, however that petition was rejected by this Court and Petitioners refiled on March 16, 1992. Respondents filed their opposition to Petitioners' Writ of April 15, 1992. This Court granted *certiorari* on May 18, 1992. —— U.S. ——, 118 L.Ed. 2d 541 (1992).

[3] *Caravan* has been recently overturned by a different panel in *Advance United Expressways, Inc. v. Eastman Kodak*, —— F.2d ——, No. 91-1320, 1992 WL 142813 (5th Cir. June 26, 1992), a petition for rehearing is pending.

SUMMARY OF ARGUMENT

This Court in *Maislin* reaffirmed that "[c]ompliance with §§ 10761 and 10762 [the filed-rate doctrine] is 'utterly central' to the administration of the Act." 111 L.Ed. 2d at 112. "Unless and until suspended or set aside, [the filed rate] is made for all purposes, the legal rate as between shipper and carrier." 111 L.Ed. 2d at 108 (twice quoting this statement from *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)). Although the Commission has never suspended or set aside the filed rates which apply to Petitioners' freight, Petitioners have unilaterally disregarded those rates for the past seven years, by merely alleging that those rates are unreasonable. Petitioners, with the support of their Amici,[4] argue that such conduct is acceptable at least with regard to an insolvent carrier because the filed-rate doctrine is controlled by a more "central" reasonable rates doctrine. In so doing, Petitioners and their Amici have rewritten the Act and have disregarded over 100 years of unbroken interpretation of the Act by this Court.

This Court's precedent has uniformly held that "[u]nder [the Act] the shipper was bound to pay the legal rates; but if he could show that it was unreasonable, he might recover reparation." *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co.*, 284 U.S. 370, 384-85 (1932). Where private litigants have sought to avoid the imposition of filed rates thought to be unreasonable, these litigants have been denied by Congress, and this Court, the right to delay payment by claiming carrier's rates to be unreasonable. *See Crancer v. Lowden*, 315 U.S. 631 (1942). Instead, shippers must pay first and then challenge the reasonableness of a carrier's rates. *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 330 U.S. 247

[4] The Interstate Commerce Commission filed an *Amici Curiae* brief in support of Petitioners. The brief will be referenced as ICC Brief at ——. A group of seven national organizations of shippers and transportation brokers filed an *Amici Curiae* brief in support of Petitioners. The brief will be referenced as NITL Brief at ——.

(1913) and *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913).

The only exception to the "pay first" rule of the filed-rate doctrine is when the United States is the shipper. *See United States v. Western Pac. R.R.*, 352 U.S. 59 (1956). Pursuant to the Tucker Act, 31 U.S.C. Section 3726, Congress has authorized the United States to withhold payment from carriers by setting off potential claims. This right of set off is 'unique," i.e. *not* available to private shippers. *See* ICC Brief at 13, n.7.

Because the Act must be interpreted based upon its plain meaning, this Court held in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), that the Act, as then written, failed to provide *any* relief (affirmative or defensive) to shippers (both the U.S. Government and private shippers) for the imposition of a filed motor common carrier rate thought to be unreasonable. Thereafter, in 1965, Congress specifically authorized a reparations procedure for all shippers. Pub. L. 89-170, 79 Stat. 65 [now codified at Sections 11705(b)(3) and (c)(1) and 11706(c)(2).] Congress in 1965 did not expand the Tucker Act to include private shippers. Thus, it cannot be reasonably argued that the reparations remedy provided by Congress in 1965, would allow a private shipper to withhold paying a carrier who sued for its filed rate charges by setting off its potential claim of rate unreasonableness. Otherwise, there would be no need for the Tucker Act to remain on the books after 1965.

The interplay between the filed rate requirements of Sections 10761(a) and 10762 and the reasonable rates requirement of Section 10701(a) has been reconciled by this Court for over a century. There has never been a problem with establishing which section governs a particular situation. "[T]he filed rate governs the legal relationship between shipper and carrier." *Maislin*, 111 L.Ed. 2d at 108. The filed rate must be enforced, without exception, unless or until the Commission finds the

rate no longer applicable because of a violation of Section 10701(a). *Keogh*, 260 U.S. at 163. The basis of the filed-rate doctrine is not, as Petitioners and their Amici argue, to ensure the reasonableness of filed rates, but rather the "stringent rule prevails, because otherwise *the paramount purpose of Congress—prevention of unjust discrimination* —might be defeated." 260 U.S. at 165. (emphasis supplied). In failing to promptly pay filed rate charges, Petitioners continue to benefit from the discriminatory rate treatment they received from CMX.

Petitioners and their Amici in order to keep their discriminatory unfiled rate bargains would have this Court find a filed rate unenforceable until found to be reasonable by the Commission. However, this Court has recently held that an administrative agency may not depart from "long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory schemes." *California v. FERC*, 495 U.S. 490 (1990). As noted by the Court in *Maislin*, if "strict adherence" to the filed-rate doctrine (which includes promptly paying a carrier's filed rates) "has become an anachronism in the wake of the MCA [the Motor Carrier Act of 1980], it is the responsibility of Congress to modify or eliminate these sections." 111 L.Ed. 2d at 114.

A debtor who is also a creditor is not automatically entitled to a set-off under 11 U.S.C. Section 553. The bankruptcy code preserves a right of set-off which existed pre-petition but does not create a right of set-off which did not exist before the bankruptcy filing. Amici NITL's attempt to use the bankruptcy code to circumvent the filed-rate doctrine is without merit, as there is no pre-petition debt to set-off since the filed rate has not been paid.

The Fourth Circuit is in accord with the longstanding doctrine that a shipper must pay first and then sue for reparations. Congress has not altered the statutory scheme as interpreted by this Court. The judgment of the lower court must be affirmed.

ARGUMENT

I. THIS COURT'S PRECEDENT ESTABLISHES THAT ANY INTERFERENCE BY A COURT WITH THE COLLECTION OF THE FILED RATE IS PROHIBITED

An unbroken line of Supreme Court opinions establishes the principle that once a rate which is on file with the Commission is effective, a common carrier's filed rate must first be paid before an aggrieved shipper may commence an action for reparations. There is no statutory right, as Petitioners and their supporting Amici urge, for private shippers,[5] to withhold payment of an unambiguous filed rate, while the Commission decides whether the filed rate is unreasonable. This Court has unwaveringly held that deviation from the filed rate is impermissible, with the most recent expression of the inviolability of the filed-rate doctrine stated in *Maislin*.

A. Early Court Decisions Establish The Appropriate Statutory Response To A Rate Reasonableness Defense

The Court first enunciated the appropriate remedy for a shipper aggrieved by imposition of an allegedly unreasonable rate in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), stating:

> . . . it may not be doubted that the power of the [Interstate Commerce] Commission would nevertheless extend to hearing legal complaints of and awarding reparations to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

204 U.S. at 442. *Abilene Cotton* made clear that redress for imposition of an unreasonable rate is through a reparation proceeding.

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[5] *Cf.* Tucker Act, 49 U.S.C. Section 66 (1976) (recodified at 31 U.S.C. Section 3726). ICC Brief at 13, n.7.

The importance placed on paying the filed rate despite the requirement for rates to be reasonable was clarified in *Robinson v. Baltimore & O.R. Co.*, 222 U.S. 560 (1911). The Court expounded upon an earlier decision asserting:

> The act . . . whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they were in effect . . .

222 U.S. at 508.

The *Robinson* Court recognized that enforcement of the reasonable rates mandate of the Act is accomplished only through a reparations proceeding. In contrast, the Act proffers no support for a defense of rate reasonableness rather than payment of the filed rate. *Robinson* declared the Act itself, not the inherent equity of a particular procedure, as the ultimate guide for the manner of enforcement.

Thus, shippers today cannot prescribe a different method of enforcement than the one promulgated by Congress. Subsequent Court holdings clarify this point and support the exclusivity of the reparations procedure. In *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247 (1913), the rationale for the importance of courts treating a rate as presumptively reasonable until deemed otherwise was explained thusly:

> Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission the carrier and shippers are alike bound to treat them as lawful. *After the rate had been abandoned the carrier is still obliged to treat it*

> *as having been lawful*, and cannot refund what had been collected under it *until* the Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but they would have to go further and treat as unreasonable a rate, *past or present*, which the statute had declared should be deemed lawful *until* it had been held to be otherwise by the Commission.

239 U.S. at 259 (emphasis supplied). Therefore, contrary to the position espoused by the Amici supporting Petitioners (ICC Brief at 26; NITL Brief at 15), a court has no authority to even make an initial or *prima facie* determination of reasonableness.[6]

A case decided the same year as *Mitchell Coal*, *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913), reached similar conclusions.[7] This Court held:

> The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless *bound to pay* and the carrier to retain what had been paid, leaving, however, to the

[6] The Commission argues that courts are to consider, in every case where reasonableness is a defense pled, whether a "threshold showing" of rate unreasonableness has been made to warrant further action by the Commission. *See* ICC Brief at 26. However, to do so courts, as a necessity, would engage in a rate reasonableness inquiry, forbidden by the statute as interpreted by this Court. Such inquiry is forbidden because courts would undoubtedly differ in establishing what a *prima facie* case is thus thwarting uniformity of application of rates.

[7] The gravamen of the plaintiff's complaint was that the Pennsylvania Railroad had paid other shippers rebates of from 10 to 45 cents per ton, while paying plaintiff a rebate of only 10 to 25 cents per ton.

> former the right to apply to the Commission for reparation.

230 U.S. at 197 (emphasis supplied). Accordingly, a shipper must *pay* the filed rates promptly and then seek relief from the Commission. The Court recognized that the rates may be unreasonable, yet possible unreasonableness may not interfere with payment. Here, CCE and Reiter are petitioning the Court to enjoin payment of the filed rate by staying the action because the rate *may* be unreasonable. Petitioners thus request this Court to overturn the holdings in *Mitchell Coal* and *International Coal*. However, this Court has for almost eighty years repeatedly affirmed the pay first approach of *Mitchell Coal* and *International Coal*.

In *Keogh v. Chicago N.W. Ry. Co.*, 260 U.S. 156 (1922) Justice Brandeis writing for the majority stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.

260 U.S. at 163. Therefore, a rate is legal, i.e. collectible until it is found to be unlawful by the Commission.

In *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924), when next confronting this issue, the Court concluded: "The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified." 264 U.S. at 425. Despite this clear instruction, Petitioners and supporting Amici now maintain that filed rates are to be presumed unlawful. However, as made clear in *Louisville & Nashville R.Co. v. Maxwell*, 237 U.S. 94 (1915), this Court has consistently required adherence to the filed tariff until the rate is declared unlawful by the Commission.

A filed rate has always been presumed lawful and collectible until a contrary Commission decision.[8] The de-

[8] The Court in *Maislin* recognized that common carrier filed rates are presumptively reasonable absent a contrary Commission deci-

fense of rate reasonableness turns statutory law and established Supreme Court precedent on its head by declaring a rate unlawful (i.e. uncollectible) before a Commission determination has been made. Such a result cannot exist if the structure of the Act is to be maintained. 49 U.S.C. Section 10708 provides the statutory mechanism should shippers desire to challenge the reasonableness of a proposed rate. Congress allowed the Commission the authority to suspend proposed rates for a *maximum period* of 7 *months*. Neither the Commission nor courts have power to extend this period. *See generally Arrow Transpotration Co. v. Southern Ry. Co.*, 372 U.S. 657 (1963). In an investigation and suspension proceeding, the carrier bears the burden of demonstrating reasonableness. 49 U.S.C. Section 10708(e). Under the Act, this is the only period when a carrier must prove reasonableness *before* collecting the tariff rate. After the rate becomes effective, the statute attaches a completely different legal significance to it. Once effective, the rate becomes presumptively lawful. The Court made this clear in *Square D Co. v. Niagara Frontier Traffic Bureau, Inc.*, 476 U.S. 409 (1986), when it observed:

> In this case, unlike *Keogh*, the [carriers'] rates, established in the tariffs that had been filed with the ICC were not challenged in a formal ICC hearing before they were allowed to go into effect. They were, however, duly submitted, *lawful* rates under the Interstate Commerce Act in the same sense that the rates filed in *Keogh* were lawful.

476 U.S. at 417 (emphasis supplied).

Of course, this is not to say that the filed rate is sacrosanct. It may be challenged under 49 U.S.C. Section 10704 for the future and under Section 11705(b)(2) and (3) for reparations. However, unlike a suspended,

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sion. "The ICC did not determine whether the tariff rates were unreasonable . . . . We therefore must assume, for purposes of our decision today, that the rates were reasonable." 111 L.Ed.2d at 110, n.10.

proposed rate where the carrier must prove reasonableness, an effective rate is presumed reasonable and the shipper now carries the burden of proving unreasonableness. Moreover, the carrier cannot be prevented from collecting its filed rate during a complaint proceeding challenging an effective date. The carrier is required to collect the filed rate "unless and until" that rate is shown to be unreasonable. Hence, the language in *Maxwell* and *Arizona Grocery*.

B. A Stay of Collection of An Unambiguous Filed Rate Is An Inappropriate Procedure

Prompt payment of the filed rate is necessary before commencement of an action at the Commission. The Court in *Lowden v. Simonds—Shields—Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) held that "until changed, tariffs bind both carriers and shippers with the force of law." The allowance of a rate reasonableness defense, as requested by Petitioners has the exact opposite effect. In essence such a procedure declares a rate unreasonable until a Commission decision is rendered. This is in direct conflict with the statutory scheme.

In *Crancer v. Lowden*, 315 U.S. 631 (1941), the Court addressed the "pay first" statutory prerequisite directly. The shippers contended the district court erred in denying their motion to stay proceedings pending action by the Commission. The Court disagreed, concluding:

> The issue of the reasonableness of the rates was *not open* to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad *only to collect* the rates for which the tariff called and for the District Court only to see that the railroad did collect them.

315 U.S. at 635 (emphasis supplied). While the Court's earlier cases had affirmed that the rates were to be enforced until deemed unreasonable by the Commission, *Crancer* made it clear that a court was not required to stay collection in order to wait for the Commission's decision as to reasonableness.

Furthermore, the Court in *Crancer* recognized the shippers "suffered no hardship as a result of the trial court's insistence on proceeding with the trial." 315 U.S. at 636. This does not suggest, as do Petitioners and supporting Amici, that the Court sanctioned any alternative to payment of the filed rate. *See* Petitioners' Brief at 10; NITL Brief at 20; ICC Brief at 21.

Petitioners and their Amici attempt to establish a different standard for insolvent carriers based upon *Crancer*. However, *Crancer* did not state or imply that upon a finding of unreasonableness the shipper would be guaranteed to recover its judgment. In fact, there is nothing in the Act or this Court's decisions which imply a court must first determine if a carrier has the financial ability to pay a reparations award at some undetermined future date.

Indeed, a carrier could make the corresponding argument against a delay in payment of the filed rate.[9] A shipper could also go bankrupt while the Commission determines the reasonableness of the rate. *See* Brief of Amicus American Freight at 4. Furthermore, no remedy exists for a carrier to recover the filed rate from a bankrupt shipper if the Commission ultimately finds the filed rate to be reasonable. The Act requires no investigation into the financial status of the carrier before payment of the transportation charges, and any contention that one exists, for either shipper or carrier, is folly.

C. The Fourth Circuit's Opinion Is Consistent With This Court's Current Posture With Respect To Rate Reasonableness

The current posture of the Court is articulated in *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 657 (1963) and its progeny culminating in *Burlington N., Inc. v. United States*, 459 U.S. 131 (1982). In *Arrow*,

[9] In fact, the *Maislin Industries* case is still pending before the Commission today despite a record that has been closed for over one year.

this Court held that the power to suspend the application of a filed rate "was entrusted to the Commission only." 372 U.S. at 667.[10] Simply put, a district court has no power to make the assumption that a filed rate is in any way unreasonable. This Court in *Arrow* concluded:

> A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain.

372 U.S. at 669-70.

Furthermore, the Court in *Arrow* stressed the importance of timing, holding that:

> . . . [it] would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive. The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction.

372 U.S. at 668 (emphasis in original).

[10] Professor Sharfman, in his renowned treatise on the early history of the Commission, maintains this view as well. The failure of the Commission to issue an order within a subscribed suspension period meant that the proposed changes became effective although the Commission might continue its investigation and bring it to decision. The purpose of the suspension was presumably to give the shipper extra protection against the imposition of an illegal rate. Sharfman notes that the suspension power was unfair to carriers because the proposed changes in rates, might be found to be justified; and no means was available to the carriers for revenue lost in the interim. In contrast, the shippers could later sue if a rate was found to be unreasonable after the suspension period terminated and they had paid the rate. 1 *Sharfman, The Interstate Commerce Commission* (1931), 202.

In the case presently before this Court the district court's stay and referral order envisions that the Commission will (or could) find CMX's filed rates unreasonable. Therefore, the district court's order clearly relates to the timing of a rate change and is out of harmony with the "uniformity of rate levels" mandated by the Act. A district court has no power to make the assumption that a filed rate is unreasonable.

In three cases subsequent to *Arrow* but prior to *Burlington N.*, this Court has denied the federal court's authority to interfere with rates regulated by the Act. In *Atchison, T.& S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973), the district court enjoined the rates which the Commission had already approved. The Commission's proceeding had been concluded or had been perceived to be concluded by the Commission. The district court maintained that the Commission had failed to adequately explain its reasoning, despite the fact that by law "carriers may put into effect any rate that the Commission has not declared unreasonable." 412 U.S. at 819. This Court reasoned, as it had in *Arrow*, that Congress, by giving the Commission the power to suspend rates, had intended to preclude the courts from doing the same. Any injunctive determination made by the courts intrudes upon what the "doctrine of primary jurisdiction is designed to avoid." 412 U.S. at 821.

The holding in *Arrow* that an injunction would directly interfere with the Commission's decision as to when the rates were to go into effect, gave strength to the decisions in *United States v. SCRAP*, 412 U.S. 669 (1973) and *Consolidated Rail Corp. v. National Assn. of Recycling Indus., Inc.*, 449 U.S. 609 (1981). In *SCRAP* the district court granted an injunction against the filed rate on grounds of noncompliance with NEPA. However, this Court reversed the action of the district court by refusing to enjoin the rate increase. The Court feared an inconsistency would develop if a defense to payment of the applicable filed rate was permitted. 412 U.S. at

696. Any defense to payment of the filed rate would surely create the same inconsistency which concerned the Court in *Arrow*. In reaffirming the reasoning behind payment of the filed rate the Court explained:

> . . . to grant an injunction in the present context, *even though not based upon a substantive consideration of the rates*, would directly interfere with the Commission's decision as to *when* the rates were to go into effect, and would ignore our conclusion in *Arrow*. . . .

412 U.S. at 697 (emphasis in original and supplied). The Court did not regard the Act as providing any defense against payment of the filed rate. Once rates are in effect the *only* power of a court is enforcement. A claim against the rate, whether as violative of NEPA or as unreasonable must be brought before the Commission.

The Court in *SCRAP* expounded upon the importance of timing articulated in *Arrow* stating that:

> The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers.

412 U.S. at 697.

A few years later in *Consolidated Rail*, where the Commission fixed rates for recycled material, the Court of Appeals for the District of Columbia Circuit enjoined the effectiveness of new rates until after the Commission's reconsideration. This Court in reversing found "no basis in our prior decisions for the revocation order or for the injunction against further increases." 449 U.S. at 612. The Court further concluded that "the authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission." 449 U.S. at 612.

Courts may not interfere with the timing of rate changes by preventing collection of a legal rate, "Con-

gress channeled *all rate decisions* to the Commission in the first instance . . . court-ordered relief interferes with the delicate balance the Act strikes between the competing interests of shipper and carrier. . . ." *Burlington N.*, 459 U.S. at 140 (citations omitted and emphasis supplied). The Court reversed the Court of Appeals' decision that a carrier could not collect new rates that had been filed with the Commission while the Commission had the rates under scrutiny. This Court has repeatedly acknowledged that court-ordered injunctions concerning the collection of effective, filed rates violate the meaning and purpose of the Act. A court cannot use a stay,[11] in lieu of an injunction to allow the shipper a rate reasonableness defense. A stay is an injunction. In order to decide if a stay is warranted a court out of necessity must delve into an impermissible consideration of issues of reasonableness.

In *Maislin*, *supra*, this Court reaffirmed the precedent in *Arizona Grocery*, *supra*, which recognized that the filed rate is the legal rate, however:

> Under [the Act] the shipper was *bound to pay* the legal rate; but if he could show that it was unreasonable he *might* recover reparation.
>
> The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonablness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts.

111 L.Ed. 2d at 110 (citation omitted and emphasis supplied).

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[11] A stay is defined as:

> A suspension of the case or some designated proceedings within it. It is a kind of *injunction* with which the court freezes its proceedings at a particular point.

Black's Law Dictionary 1413 (6th ed. 1990) (emphasis supplied).

After reaffirming the "pay first" rule set forth in *Arizona Grocery*, the Court in *Maislin* refrained from making any judicial pronouncement concerning rate reasonableness, other than to observe that its rejection of unreasonable practices as an exception to the filed-rate doctrine did not foreclose exploring "the issue of the reasonableness of the tariff rates . . . on remand." 111 L.Ed. 2d at 110, n.10. The issue of rate reasonableness simply was not before the Court. Rather, upon exploration, prior Court precedent mandates that the obligation to pay the filed rate is a prerequisite to litigating the rate reasonableness issue. Certainly, this Court was not overruling *Arizona Grocery* in footnote 10 of *Maislin*, when it cited that case with approval in the text of the decision.

D. *Western Pacific* Provides No Support For Petitioners' Request—Rather It Confirms That Petitioners Must Pay First

Reliance by Petitioners and supporting Amici on *Western Pacific*, *supra*, is misplaced for a variety of reasons. Foremost among these is that the Tucker Act[12] specifically allows the United States a "unique right" to withhold payment of its freight bills, a right not allowed to private litigants. *See* ICC Brief at 13, n.7. The Government in *Western Pacific* applied alleged overpayments that it had already made against current billings. When the carrier sued for the payments, claiming there was no overpayment, the Government defended on rate applicability grounds. The inquiry into reasonableness was limited to determining which of two filed rates applied.[13]

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[12] 49 U.S.C. Section 66 (1976) (recodified at 31 U.S.C. Section 3726).

[13] Even if the inquiry in *Western Pacific* was limited solely to rate reasonableness, since the United States Government has the right to set off claims and not pay carriers filed rates, it could raise rate reasonableness as a defense to a subsequent carrier suit for collection of the filed rate charges. Such is simply not true for private shipping litigants. If it were true then Congress would not have had to pass the Tucker Act to give the United States Government its "unique right" to set off.

The Court in *Western Pacific* noted "We hold, therefore, that the limitations of Section 16(3) [now Section 11706(c)] does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction, as were these questions relating to the applicable tariff." 350 U.S. at 74.

In the instant case, the government is not the shipper nor is there a choice between two "filed rates" so that it could be argued that a defense exists within the primary jurisdiction of the Commission. Instead, Petitioners are merely attempting to raise a reparations claim without first paying CMX's filed tariff charges.[14] Therefore Petitioners can not base a reasonableness defense on *Western Pacific*.

II. THE DOCTRINE OF PRIMARY JURISDICTION AND ALL BUT RECENT OPINIONS OF THE INTERSTATE COMMERCE COMMISSION SUPPORT A PAY FIRST APPROACH

A. The Doctrine Of Primary Jurisdiction Is Misapplied By Petitioners

The doctrine of primary jurisdiction prohibits courts from entering into areas which Congress has delegated to the Commission. Contrary to Petitioners' and their Amici's assertions, requiring payment of the filed rate does not infringe upon the Commission's primary jurisdiction.

The Court has long held that the issue of rate reasonableness requires "preliminary resort to the Commission." *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). However, if a court stays a proceeding and refers it to the Commission without compelling payment

[14] Similarly, Amici's reliance on *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202 (1960) is misplaced because that case also involved the United States as the shipper and was governed by the Tucker Act. ICC Brief at 13; NITL Brief at 17-18.

of the filed rate, then the court is making a preliminary determination of unreasonableness. The Ninth Circuit's instruction to the lower court in *Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, —— F.2d ——, No. 91-55059, 1992 WL 152140 (9th Cir. July 7, 1992) demonstrated this intrusion into the Commission's jurisdiction:

> The district court need not refer the issue of reasonableness to the ICC if there is no reasonable liklihood that the ICC will reach a determination favorable to the shipper.

—— F.2d ——, 1992 WL at *6. Likewise, the First Circuit in, *Delta Traffic Service v. Transtop Inc.*, 902 F.2d 101, 106 (1st Cir.), *withdrawn in part*, 1990 U.S. App. Lexis 13339 (1st Cir. 1990), also sanctioned court interference into reasonableness determinations and maintained: "In our view, these facts, taken together, show a sufficient possibility of an 'unreasonableness' determination to warrant referral." 902 F.2d at 106. Thus, in a rate-referral without payment scenario a court would be directly interfering with the Commission's primary jurisdiction. The referring circuits referenced by Petitioners and Amici are thus in conflict with this Court's holdings in *Arrow*, *SCRAP* and *Burlington N.*[15]

The Court specifically addressed the issue of abeyance and primary jurisdiction in *Far East Conference v. United States*, 342 U.S. 570 (1951), asserting that:

> . . . no purpose will be here served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate.

342 U.S. at 577. The Court also stated "in cases raising issues of fact not within the conventional experience of

[15] *See* Petitioners' Brief at 13-14; ICC Brief at 14-15; NITL Brief at 19, n.11.

judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." 342 U.S. at 574. The Court recognized the separation of judicial and administrative actions and refused to stay the proceeding. A court cannot intrude upon the primary jurisdiction of the Commission by making a preliminary determination as to reasonableness. Thus, the Court in *Far East* considered holding an action in abeyance, like the stay requested by Petitioners, an interference with the primary jurisdiction of the Commission.

Amicus NITL misapplies the holding in *Far East Conference*, *supra*, by equating it with a rate reasonableness defense. NITL Brief at 15. The Court in *Far East* was merely distinguishing the role of the courts from the role of administrative agencies. In the present case the Fourth Circuit followed the holding in *Far East* by enforcing payment of the filed rate and allowing the Commission to determine reasonableness. A court is not required to first consider whether a shipper will be able to obtain a complete remedy when carrying out the provisions of the Act, nor does the Commission offer any case law to support such a notion.

B. The Commission's Decisions And Reports Have Historically Supported Payment Of The Filed Rate And A Later Suit For Reparations

Recent Commission determinations do not correspond with the position adopted by the Commission for the past 100 years. The Commission as recently as 1984 intervened in a Fifth Circuit Court of Appeals case to stress the importance of the pay first approach. The court in *Southern Pac. Transp. Co. v. San Antonio Texas*, 748 F.2d 266 (5th Cir. 1984), followed this Court's precedent in regard to primary jurisdiction stating "where the reasonableness of a rate is at issue, 'there must be a preliminary resort to the Commission'." 748 F.2d at 273. Both Petitioners and Respondents support this position,

however, the two diverge on the issue of whether a shipper can await the Commission's decision before paying the rate. The Fifth Circuit maintained:

> In the present case, forcing San Antonio to pay the filed rate immediately would not interfere with the ICC's primary jurisdiction to determine reasonableness. The fact that the rate has already been paid does not change the Commission's inquiry. The I.C.C. scrutinizes the same rate terms (as interpreted by the District Court) whether or not payment has been made.

748 F.2d at 273. The Court concluded:

> In sum, the primary jurisdiction of the ICC would not be impaired by immediate execution of the judgment for the railroad.

748 F.2d at 273.

The Fifth Circuit in *Southern Pac.* noted "that the Commission agrees with our conclusion. *See* Brief of Intervenor at 12." 748 F.2d at 273 n.14. Appendix B hereto at 17a. In its brief at the Fifth Circuit, the Commission shared the fear expressed in *Burlington N.* that a reasonableness defense would establish "an incentive for shippers to file complaints with the Commission, while withholding payment of the tariff rates, in hopes that the federal courts would sanction such violations of the filed-rate doctrine." Brief of Intervenor at 15 Appendix B at 19a-20a. The Commission also expressed its unequivocal support for adherence to the pay first approach by citing *Davis v. Portland Seed Co.*, *supra*, and *Pennsylvania R.R.Co. v. International Coal Mining Co.*, *supra*. Brief of Intervenor at 14, Appendix B at 19a. The Commission, in its Brief here, ignores *Davis* and *Southern Pacific* and places a "revisionist" gloss on *International Coal*.

The Commission also ignores a long line of early Commission cases which identify reparations as the sole remedy for past unreasonable rates. *See Perry v. Florida Central & Peninsular R. Co.*, 3 I.C.C. 740, 745 (1891);

Cattle Raisers' Assoc. v. C.B.Q.R. Co., 10 I.C.C. 83, 97 (1904) ("has the party seeking recovery paid the filed rate"); *Sloss-Sheffield Steel & Iron Co. v. L. & N. R.R. Co.*, 51 I.C.C. 635, 641 (1918) ("rates are binding as the lawful rates until overturned or modified after they have been ascertained upon full hearing and investigation to be unreasonable"); *Anadarko Cotton Oil Co. v. A.T. & A.T. & S.F. Ry. Co.*, 20 I.C.C. 43, 49 (1910).

For almost one hundred years the Commission would not even consider a claim that a carrier's rates were unreasonable without proof of payment of the rate by the shipper. The Commission's unprecedented reversal on this issue can only be understood as another misguided attempt to rewrite the Act with regard to bankrupt carriers due to the plethora of pending undercharge actions.[16] Of course, Congress did not alter the statute upon which the Commission's century long interpretation was based, therefore, the Commission cannot find any legislative basis for its new view of the reparations remedy.

C. The Commission's Statutory Interpretation Must Be Rejected In The Same Fashion As The Court Rejected Its *Negotiated Rates* Policy In *Maislin*.

The Commission concedes that this Court in *Maislin* struck down its *Negotiated Rates* policy statement because that policy rested upon an interpretation of the Act that is "contrary to the language and structure as a whole, and the requirements that make up the filed-rate doctrine in particular." ICC Brief at 4, citing 110

[16] As this Court is aware, since before the 1986 *Negotiated Rates* policy statement, the Commission has done an "about face" with regard to its enforcement of the filed-rate doctrine. The Commission's continued bias against the public tariff system in general and the filed-rate doctrine in particular is reflected in the Commission's Rate decision in *Petitions for Issuance of Rate Reasonableness and Unreasonableness Practices Policy Statement*, 8 I.C.C. 2d 61 (1991) and views of the Commission's Chairman Edward J. Philbin. *See* Brief of Amicus Leonard L. Gumport at 21-23.

S.Ct. at 2768. Yet, in seeking to carve out an insolvency rule for the filed-rate doctrine, the Commission asserts a position which is in effect an end run around *Maislin*. The purpose is clearly to forestall trustees in bankruptcy from timely liquidating estates, while the Commission lobbies Congress to provide a legislative remedy.[17]

The Commission would have this Court adopt a rule which would foreclose *any* collection of filed rate charges from any shipper who claims rate reasonableness as a defense until such time, if at all, that the Commission has passed on the reasonableness of the carrier's filed rate. The Commission claims that the primary purpose of the filed-rate doctrine is "to prevent rate discrimination accomplished through published rebates." ICC Brief at 6. It further believes the purpose of the filed-rate doctrine is no longer served by forcing shippers to pay filed rate charges to a liquidating carrier before a reasonableness determination is made because "there is no possibility of a defunct carrier unlawfully discriminating for or against any shippers while the rate reasonableness challenge is being resolved." ICC Brief at 6, citing 8 I.C.C. 2d at 68. Besides anti-discrimination, another purpose of the filed-rate doctrine, according to the Government, is to insure "prompt collection of charges" in order to maintain "a stable transportation system." ICC Brief at 6. However, the Commission asserts that economic stability is no longer necessary when the carrier is no longer operating. ICC Brief at 6.

In other words, the Commission says that while a motor carrier was operating, it was required to charge and shippers were bound to pay filed rates without regard to their reasonableness. However, because of the Commission's failure to enforce the filed rate during the

[17] The Commission informs the Court that the Commission has already pending before it some 200 cases involving rate reasonableness filed since *Maislin*. Noteworthy, no reasonableness decisions have been rendered by the Agency.

1980's, carriers failed to abide by this strict statutory requirement. The prompt payment of filed rates, of course, never occurred and there has been financial instability throughout the industry due to cutthroat competition. *See* Brief of Amici International Brotherhood of Teamsters at 2; Leonard L. Gumport at 2-4; Lloyd T. Whitaker at 3. During the 1980's carriers, while active, ignored the filed-rate doctrine, in part encouraged by the lack of enforcement by the Commission. Now, ironically, the Commission instructs this Court to continue to ignore the filed-rate doctrine and the purposes of the Act because in the Commission's view, the damage has already been done. It is the same convoluted logic that this Court rejected in *Maislin*.

In *Maislin*, the Commission argued that "in light of the more competitive environment, strict adherence to the filed-rate doctrine is 'inappropriate and unnecessary to deter discrimination today.'" 111 L.Ed. 2d at 113, citing Negotiated Rates I, 3 I.C.C. 2d at 106. This Court noted that, "according to the Commission, 'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers.'" 111 L.Ed. 2d at 113.

The Court, however, found such a characterization unconvincing because even if the filed-rate doctrine is an "anachronism" in the wake of the Motor Carrier Act of 1980, "it is the responsibility of Congress to modify or eliminate these sections" and not the ICC. 111 L.Ed. 2d at 114.

The Commission refuses to understand the lesson of *Maislin* that administrative policy may not trump a congressional mandate. The filed-rate doctrine as codified at 49 U.S.C. Section 10761(a) mandates that carriers and shippers conduct their business pursuant to filed tariffs *at all times*. Shippers are deemed to know the filed rates of a common carrier. As noted by the Commission, "The filed-rate doctrine requires carriers to 'collect, and shippers to pay, the rates contained in the filed ICC tariffs.'" ICC Brief at 16. Under the filed-rate doctrine, "It is not a defense that the shipper was ignorant of the rate, that the carrier misquoted it, or that the parties agreed to a different rate." ICC Brief at 16, citing *Maislin; Maxwell, supra; Keogh, supra*. Since shippers are presumed to know the rate, they may not claim, under the law, that they did not have every opportunity to seek reparations while the carrier was alive and well. Thus, the Commission's equitable arguments ring hollow when it claims that the requirement of paying an undercharge bill denies shippers a meaningful remedy to seek reparations. As noted by this Court in *Maislin*, even if the equities of the situation were relevant, it is "difficult to see how the equities favored the shipper." 111 L.Ed. 2d at 112, n.12. The shippers could require "proof" of filing or use "watching services" who can determine filed rates with "up-to-the-minute details of a carrier's rate schedule." 111 L.Ed. 2d at 112, n.12.[18]

III. A RATE REASONABLENESS DEFENSE IS NOT ESTABLISHED THROUGH THE LEGISLATIVE HISTORY OF THE INTERSTATE COMMERCE ACT, THE HOLDING IN *T.I.M.E.* NOR SUBSEQUENT LEGISLATION WHICH GAVE SHIPPERS THE RIGHT TO SUE FOR REPARATIONS

The legislative history of the Act provides no support for a rate reasonableness defense. The courts originally had jurisdiction over both applicable rates and the reasonableness of rates. However, the Act was amended by the

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[18] In this case, Petitioners, as Commission regulated brokers, are experienced users of the transportation system. For example, pursuant to the Commission's brokerage regulations, 49 C.F.R. Section 1045.10, Petitioners are duty bound to abide by the Act and Commission regulations regarding the payment of carrier charges. Brokers must refrain from misrepresentation, Section 1045.7, and may not engage in rebating, Section 1045.9.

Hepburn Act,[19] to extend the Commission's primary jurisdiction over reasonableness of rates. The Commission, upon complaint and after full hearing was empowered not only to condemn the existing rates (including regulations and practices affecting such rates) as unjust or unreasonable, but also to determine and prescribe just and reasonable rates for the future.[20] Congress delegated this function to the Commission because the courts could not properly adjudicate a reasonableness action.

Until 1965 shippers had no statutory right to even seek reparations from motor common carriers for unreasonably high rates. Although Congress in 1965 amended the Act to give motor carrier shippers a right to seek reparations, this right is limited to seeking reparations and cannot be used defensively.

Prior to 1959 the Commission had set up a procedure whereby shippers, such as Petitioners here, could petition the Commission for an order waiving undercharges. *See Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337 (1944). This procedure was challenged in *T.I.M.E.*, *supra*.[21]

Relying on *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), this Court reversed, holding that the Act did not "give shippers a statutory cause of action for the recovery of alleg-

[19] Interstate Commerce Act, Pub. L. No. 12987, Chap. 3591, Sec. 4, § 15, 34 Stat. 584, 589 (1906).

[20] 1 *Sharfman* at 45.

[21] In *T.I.M.E.*, several motor common carriers had sued the United States, as shipper, to collect freight charges. The government defended on the grounds that the rates upon which the carriers relied were unjust and unreasonable. The district court granted summary judgment to the carriers, but the Court of Appeals reversed on the ground that the Government was entitled to a Commission determination of the reasonableness of the tariff rates, notwithstanding the Commission's inability to award reparations on motor carrier rates for past shipments.

edly unreasonable past rates, or to enable them to assert 'unreasonableness' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

As here, it was asserted in *T.I.M.E.* that a statutory cause of action or defense existed by the virtue of the language in 216(b) of the Motor Carrier Act (the predecessor to present section 10701(a)) requiring that a carrier's rates and practices be reasonable. The Court in *T.I.M.E.* held that the statutory duty to establish and observe reasonable rates and practices creates only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right." 359 U.S. at 469. Then, as now, Section 10701(a) imposes upon common carriers a duty to maintain reasonable rates but provides shippers no defense for a violation of that duty.

The Court further explained that:

> The very provisions of Part I, and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act.

359 U.S. at 470. Likewise, Section 11705(b)(3) conspicuously leaves out any defense to payment of the filed rate.

This Court in *T.I.M.E.* also addressed the contention that the Motor Carrier Act preserved a pre-existing common law right to a reasonable rate. Relying on *Abilene Cotton*, *supra*, the Court concluded that under the statutory scheme only the Commission could determine the reasonableness of a rate and therefore any common law right was necessarily extinguished as absolutely inconsistent with the statute. 359 U.S. at 473. The government had urged that such a remedy would be consistent with the statute when coupled with referral to the Commission for a determination of the reasonableness issue

as an adjunct to a judicial proceeding. The Court rejected this contention stating;

> To permit a utilization of the procedure here sought by the government would be to engage in the very 'improvisation' against which this Court cautioned in *Montana-Dakota*, supra, in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly.

359 U.S. at 475.

The holding in *T.I.M.E.* left purchasers of motor common carrier services without any remedy whatsoever with respect to unreasonable rates imposed on past shipments.

However, in 1965 the 89th Congress created a reparation remedy for the failure of a motor carrier to maintain just and reasonable rates. Pub. L. 89-170, 79 Stat. 651, amended Section 204(a) of the Motor Carrier Act to provide a cause of action against motor carriers for recovery of "reparations" defined as "damages resulting from charges for transportation services to the extent that the Commission upon complaint made as provided in section 216(e) of this part . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." 49 U.S.C. Section 304(a)(5) (1965).[22]

The legislative history indicates that Congress's response to *T.I.M.E.* was limited to providing a reparations remedy for motor carrier shippers. Section 204(a) of the Act did not disturb the holding in *T.I.M.E.* except to

[22] The Interstate Commerce Act was recodified in 1978. *See* Pub. L. 95-473, 92 Stat. 1337, October 17, 1978. The revisions effected no substantive change. The pertinent provisions of former Section 204(a), 49 U.S.C. Section 304(a), now appear in 49 U.S.C. 11705 (b)(3) and 11706(c)(2). Examination of the prior language is required to determine the intent of Congress. *Trailer Marine Transport Corp. v. Federal Maritime Commission*, 602 F.2d 379, at 383 n. 18 (D.C. Cir. 1979).

allow the commencement of a reparations action for damages. *See United States v. Assoc. Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974); H.R. Rep. No. 253, 89th Cong 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin News at 708, 712 states:

> The sections would amend Parts II and IV of the Interstate Commerce Act, applicable to motor carriers and freight forwarders, respectively, so as to permit shippers to recover reparations up to two years after the cause of action arises.

S. Rep. No. 387, 89th Cong., 1st Sess. reprinted in 1965 U.S. Code Cong. & Admin. News at 2923 is even more specific:

> In granting a right of action to shippers to recover reparations, the Committee intends those seeking reparations must file a court complaint before seeking the Commission's administrative determination.

The language of the 1965 law is very specific in providing a remedy only where a shipper has paid the carrier's filed rates and commences an action at law to recover reparations. That has not been done by Petitioners here. The narrow reparations remedy cannot be read, in light of *T.I.M.E.*, as providing private shippers with a defense to an action to collect tariff charges.[23]

T.I.M.E. squarely stands for the proposition that while the Act requires rates to be reasonable, it does not provide a shipper a defense against a motor carrier for violation of that duty. The exception Congress enacted relates merely to reparations. Before a shipper can challenge the reasonableness of a carrier's rate it must first

[23] While *T.I.M.E.* involved the U.S. Government as a shipper, despite the Tucker Act, the Government could not raise unreasonable as a defense because there was no affirmative right to recover reparations from motor carreirs. The 1965 Amendment restored the Government's and private shippers' right to recover damages for unreasonable rates, and thus because of the Tucker Act, also restored thhe Government's "unique" right to raise unreasonableness as a defense.

pay and then commence an action at law. If Congress intended to create a rate reasonableness defense it would have been articulated in the statute. *Cf.* Tucker Act, *supra*. Justice Scalia's concurring opinion in *Maislin* articulated this same point when he was discussing the Act juxtaposed with the Commission's deregulation argument:

> . . . while this plainly reflects an intent to deregulate, it reflects an intent to deregulate *within the framework of the existing statutory scheme*. Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours.

111 L.Ed. 2d at 116 (emphasis original).

When Congress recodified 49 U.S.C. Section 304(a)(5) in 1978, the word damages was substituted for reparations.[24] Both of these words convey that one cannot be damaged or awarded reparations unless one has been injured in the first place. If a shipper has not yet paid the filed rate, then pursuant to the Act no injury has occurred.

Congress could have amended the Act to allow a private shipper the right to withhold payment until a determination as to reasonableness was made or required a shipper to make a threshhold showing of unreasonableness in order to delay payment. The fact that Congress did not include these or comparable provisions such as are contained in the Tucker Act is confirmation that for private shippers a defense of rate reasonableness as an exception to payment of the filed rate does not exist.

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[24] Reparations is defined as: "Payment for an injuiry or damage; redress for a wrong done." *Black's Law Dictionary*, 1298 (6th ed. 1990). While damages, the word appearing in 49 U.S.C. Section 11705(b)(3), is defined as:

> A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.

Black's Law Dictionary, 389 (6th ed. 1990).

IV. PETITIONERS CANNOT SEEK SANCTUARY IN THE BANKRUPTCY CODE OR CMX'S BANKRUPT CARRIER STATUS

A. The Bankruptcy Code Does Not Give A Shipper An Absolute Right To Set-Off A Claim Of Rate Reasonableness Against A Carrier's Claim For Collection Of The Filed Rate

11 U.S.C. Section 553 of the Bankruptcy Code gives broad, equitable discretion to bankruptcy courts to recognize set-off rights meeting the two criteria of the statute, i.e. mutuality of the obligations and pre-petition origins of both claims. However, 11 U.S.C. Section 553 does not state that a creditor who is also a debtor is automatically entitled to raise the defense of recoupment against *any* claim by the estate. The issue of mutual debts was discussed in *In Re Verco Industries*, 10 B.R. 347 (Bankr. 9th Cir. 1981), *rev'd on other grounds*, 704 F.2d 1134 (9th Cir. 1983). The bankruptcy court explained, "Section 553 of the Code permits a set-off of mutual debts that arose before the commencement of the case. 11 U.S.C. Section 553(a). Here we can find no mutual debt." 10 B.R. at 352. The same would be true for a shipper and carrier, since a carrier had no debt to the shipper because the shipper had not paid the filed rate. Therefore, the set-off should not be permitted by the Court.

Moreover, in *Riggs v. Government Emp. Financial Group*, 623 F.2d 68 (9th Cir. 1980), citing section 108(a) of the Bankruptcy Act:

> In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. 11 U.S.C. Section 108(a) (1976) (superseded 1978),

the court explained:

> Despite the seemingly mandatory language of this provision, it is well settled that allowance of a set-off lies within the sound discretion of the trial court.

663 F.2d at 73. Any claim by the Amici to a mandatory set-off is inaccurate. *See* NITL Brief at 28-29.

Under the Act "a carrier may not charge or receive different compensation for that transportation or service than the rate specified in the tariff." 49 U.S.C. Section 10761. A set-off would be the equivalent of accepting a lower rate than specified in the tariff. Thus, the NITL Amici favor abandoning the statutory scheme and allowing a carrier to accept less than the filed rate.

Since the inception of the Motor Carrier Act of 1935, the Commission has held that a motor common carrier may not lawfully delay or postpone the collection of its filed rate simply because a shipper has filed a loss and damage claim with the motor carrier: the carrier must collect its lawfully established charges; and any claim for damages to the freight is a matter "entirely distinct from the collection of established charges for transportation and do[es] not in any way relieve the carrier from such duty to collect such charges." *ICC Administrative Ruling No. 65, August 3, 1937.*[25] Even as early as 1909 the Commission explained that the entry of an order based upon a set-off could only occur after the adjudication of the claim of the railroad company against the shipper. *Laning-Harris Coal & Grain Co. v. St.L. & S.F.R. Co.*, 15 I.C.C. 37, 38 (1909). Thereby, the Commission confirmed that a court must first compel the shipper to pay the filed rate (adjudicate the claim of the railroad against the shipper) before any consideration of a set-off.

Forty years later, the Commission reaffirmed the continued viability of its prior prohibition in *Administrative Ruling No. 65* against set-offs, but suggested under certain conditions courts may have discretion to permit set-offs of loss and damage claims. *ICC Administrative Ruling No. 128, March 9, 1978.* Nevertheless, the Commis-

[25] 2A Fed. Carr. Rptr. (CCH) para. 25,065.

[26] 2A Fed. Carr. Rptr. (CCH) para. 25,178.

sion has never held that courts can permit set-offs for failure to pay the filed rate.

In 1988, the Commission once again stated that "shippers are obligated to pay first. Set-offs of freight charges are not lawful." *Regulations for Payment of Rates and Charges—Penalty Charges—For Non-Payment*, Ex Parte No. MC-1, 4 I.C.C. 2d 340 (1988). Petitioners are correct that bankruptcy law allows set-offs under 11 U.S.C. Section 553 in many circumstances. However, under 49 U.S.C. Section 10761 and as promulgated by the Commission set-offs are not permitted. The Commission recognized the discrimination which would result if certain shippers were excused from paying the filed rate because they had a loss and damage or reasonableness claim against a carrier, while other shippers who had paid the filed rate, but had no such claim, were required to file an action for reparations.

The contention that an entity which is both a debtor and a creditor is not required to pay first is completely erroneous. In *Baker v. Gold Seal*, 417 U.S. 467 (1973), this Court disallowed a freight damage claim to be set-off against transportation charges even though the freight claim had been made the subject of a separate counterclaim and reduced to judgment. Indeed, the Court recognized that any shippers who paid the tariff rate would be discriminated against because they chose to abide by the law and not attempt a set-off. Additionally, all the other creditors of the estate would receive less merely because the shipper had a prior claim against the estate. This Court concluded:

> The allowance or disallowance of set-off may seem but a minor part of the architectural problem. But to the extent that it is allowed, it grants a preference to the claim of one creditor over the others by the happenstance that it owes freight charges that the others do not.

417 U.S. at 474.

Despite the views of the shippers, bankruptcy law does not support allowing the set-off to be used as a defense in all actions. A Third Circuit case, *In re Penn Cent. Transp.. Co.*, 477 F.2d 841 (3rd Cir.), *aff'd sub. nom. United States Steel Corp. v. Trustee of Penn. Cent. Transp. Co.*, 414 U.S. 885 (1973), involved a set-off of a loss and damage claim against collection of freight charges. The opinion distinguished a prior holding of this Court, *Chicago & N.W. R.R. v. Lindell*, 281 U.S. 14 (1930), which promoted set-offs as a method of preserving judicial economy. The Third Circuit explained: "Thus, a set-off for damages incurred in shipment is not considered a defense since the potential for effecting a preference under such a guide seems manifest." 477 F.2d at 844.

A set-off which may be a useful tool in preventing unnecessary litigation is not suited for undercharge actions. It is anarchy to award a set-off to a creditor who may not have a valid claim. If the Commission later determines the rate which was set-off to be reasonable, the trustee must await collection of the debt originally sought. Therefore, all the other creditors to the estate, with valid claims, must await payment from a creditor/debtor who did not have a valid claim. The shipper must pay the filed rate, await a Commission determination and then stand in line with the rest of the unsecured creditors of the estate. This procedure leaves the shipper in no different position than a shipper who paid the rate and is then asserting the rate is unreasonable. A shipper who has negotiated a lower unfiled rate receives no special treatment in the Act and should receive no special treatment under bankruptcy law.

B. The Interstate Commerce Act Does Not Differentiate Between A Bankrupt Carrier And A Viable Carrier, Both Are Required To Collect The Rate On File At The Commission

The Act does not differentiate between a bankrupt carrier and a viable carrier, and Petitioners' effort to

make a distinction is without merit. Furthermore, an attempt to establish one procedure for bankrupt carriers and another for viable carriers amounts to punishing the carrier who can no longer afford to operate. The carrier who manages to barely avoid bankruptcy can recover the filed rate without litigating its reasonableness, yet another carrier unable to continue operating is punished severely for its financial position.

Moreover, Petitioners claim that a delay in payment will not harm the bankrupt carrier because it does not have to meet the daily needs of operation. Contrary to that opinion, bankrupt carriers are badly in need of funds to pay creditors, many of whom are former employees. These former employees may be awaiting both medical and pension benefits, while the Commission ponders the reasonableness of a rate. The need for prompt payment of the filed rate may actually be more vital to the bankrupt carrier than to the operating carrier. *See* Brief of Amicus Leonard L. Gumport at 11-12. Under 11 U.S.C. Section 704(1),

> The trustee shall collect and reduce to money the property of the estate for which such trustee serves and close such estate as expeditiously as it is compatible with the best interest of the parties in interest.

Therefore, a trustee, by law, must compel the shipper to pay the filed rate and compensate the creditors of the estate as soon as possible.

The fact that the carrier billed and collected a rate other than the filed rate does not render the filed-rate doctrine meaningless. Indeed, the Court in *Maislin*, *supra*, maintained "we have never held that a carrier's unreasonable practice justifies departure from the filed-rate doctrine." 111 L.Ed. at 110. *Maislin* dismissed any attempt by a shipper to find a defense in a situation where a shipper was previously billed a negotiated rate.

The Court can not merely defer to the Commission's choice of the appropriate means of enforcing the statute and presume that produces an equitable conclusion, as suggested by Petitioners and their Amici. Petitioners' Brief at 20; ICC Brief at 5-7; NITL Brief at 22; American Freight at 4. The Commission as noted earlier, alters its policy in regard to certain situations and it cannot be counted on to act lawfully. For example, the Commission's *Negotiated Rates* policy statement permitted a shipper to rely on negotiated unfiled rates. This Court rejected that policy statement in *Maislin* and reproached the Commission for adopting policies "inconsistent with the statutory scheme as a whole." 111 L.Ed. at 111. Thus, any reliance on policies promulgated by the Commission must not lead the Court astray from the meaning and purpose of the Interstate Commerce Act.

CONCLUSION

Section 10761(a), the filed-rate doctrine, is, from a statutory and *stare decisis* standpoint, a crucial element of our National Transportation Policy. As stated by this Court in *Maislin*, the filed-rate doctrine is "utterly central" to the Act. It enables shippers and carriers to move freight at specific rates in a fashion that not only gives notice to all but forms the foundation of our transportation policy, anti-discrimination. The Fourth Circuit recognized the pre-eminence of that statutory provision and this Court should affirm the Court of Appeals decision.

Respectfully submitted,

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September 2, 1992

APPENDICES

APPENDIX A

[Service Date Mar. 16, 1990]

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-164423 (Sub 3-RIR)

CALIFORNIA CONSOLIDATED ENTERPRISES, INC.
WILMINGTON NC

REVOCATION OF AUTHORITY
MC-164423

The above carrier holds authority as a contract carrier authorizing it to engage in transportation by motor vehicle, in interstate or foreign commerce, and has failed to comply with Section 10927 of the Interstate Commerce Act and 49 CFR 1043 of the Commission's regulations, governing the filing of evidence of bodily injury and property damage insurance or other security for the protection of the public.

It is ordered:

Under Section 11701(a) of the Act, we hereby open an investigation to decide whether, in accordance with Section 10925 of the Act, the operating rights should be revoked due to the carrier's noncompliance with the Act and with the Commission's regulations.

The carrier must file with the Commission a written statement under oath, within 60 days after this decision is served, showing good cause why its operating rights should not be revoked. A copy of this decision will be filed in Docket No. MC-164423 and all subs thereunder.

Any questions regarding the aciton taken by the Revocation Board should be directed to Alice K. Ramsay,

Chief, Insurance Branch, telephone (202) 275-0054 or (202) 279-7511.

Decided: March 2, 1990

By the Commission, Revocation Board, Members Gaillard, Love, Hardy.

/s/ Noreta R. McGee
NORETA R. MCGEE
Secretary

[SEAL]

[Service Date May 23, 1990]

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-164423 (Sub 3-RIR)

CALIFORNIA CONSOLIDATED ENTERPRISES, INC.
WILMINGTON NC

REVOCATION OF AUTHORITY

MC-164423

By decision of the Commission, Revocation Board, entered March 2, 1990, we notified the carrier that we have opened an investigation under 49 U.S.C. 11701(a) to determine whether its operating rights as a contract carrier of property by motor vehicle should be revoked for noncompliance with our insurance regulations, with respect to bodily injury and property damage coverage.

In that decision, we ordered the carrier to file a statement within 60 days showing good cause why its operating rights should not be revoked, or establishing compliance. The carrier has failed to comply with the terms of that decision and is not in full compliance with the requirements of 49 U.S.C. 10927 and 49 CFR 1043.

It is ordered:

The carrier must file with the Commission within 60 days after this decision is served, a written statement under oath, (a) showing good cause why its operating rights should not be revoked or (b) establishing that it is in full compliance with the Act and the Commission's regulations.

The carrier is notified that failure to respond or comply with the terms of this decision shall, without further

order, result in revocation of its operating rights effective 60 days after the date this decision is served.

A copy of this decision will be filed in Docket No. MC-164423 and all subs thereunder.

Decided: May 16, 1990

By the Commission, Revocation Board, Members Gaillard, Love, Hardy.

/s/ Noreta R. McGee
NORETA R. MCGEE
Secretary

[SEAL]

[Service Date Jun 20, 1990]

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-164423 (Sub 3-RIR)

CALIFORNIA CONSOLIDATED ENTERPRISES, INC.
WILMINGTON NC

REVOCATION OF AUTHORITY

MC-164423

By decision of the Commission, Revocation Board, entered March 2, 1990, an investigation under Section 11701(a) of the Act was instituted to decide whether in accordance with Section 10925 of the Act, the operating rights specified above should be revoked for failure by the carrier to comply with the requirements of Section 10927 of the Act and 49 CFR 1043 of the Commission's regulations, governing the filing of evidence of insurance or other security for the protection of the public.

On May 16, 1990, a second decision was entered ordering compliance with those requirements or the authority would be revoked.

Subsequently, the Board has been notified that the carrier has requested revocation voluntarily of its operating authority pursuant to Section 10925(b) of the Act.

It is ordered:

The decision entered May 16, 1990, is vacated and set aside, and the proceeding instituted under Section 11701 (a) is discontinued.

It is further ordered:

The authority specified above is revoked effective the date of service of this decision.

Decided: June 13, 1990

By the Commission, Revocation Board, Members Love, Hardy.

/s/ Noreta R. McGee
NORETA R. MCGEE
Secretary

[SEAL]

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Civil Action No. 84-1059

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*,
Plaintiffs, Appellants,
and Cross-Appellees

vs.

SAN ANTONIO, TEXAS, ACTING BY AND THROUGH ITS CITY PUBLIC SERVICE BOARD,
Defendant, Appellee,
and Cross-Appellant

On Cross Appeals from the United States District Court
for the Western District of Texas, San Antonio Division

BRIEF OF INTERVENOR INTERSTATE COMMERCE COMMISSION

JOHN BROADLEY
General Counsel

ELLEN D. HANSON
Associate General Counsel

TIMM L. ABENDROTH
Attorney
Interstate Commerce
Commission
Washington, D.C. 20423

MARCH 1984

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the district court's decision under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES [1]

1. Whether the district court erred in granting summary judgment for the railroads on their claim for underpayment of freight changes without referring a question of rate applicability to the Interstate Commerce Commission?

2. Whether the district court erred in staying execution of its judgment pending a decision by the Commission on the reasonableness of rates.

STATEMENT OF THE CASE

This action was begun by the appellant railroads, Southern Pacific Transportation Company and Burlington Northern Railroad Company, in February 1981, to collect approximately $19 million in allegedly owing and unpaid freight charges on coal movements to San Antonio, Texas. The case was held in abeyance for approximately two years pending resolution of several legal issues in other forums. A summary of the various proceedings involved and relevant facts follows.[2]

Following a decision of the United States Court of Appeals for the District of Columbia Circuit,[3] vacating and remanding two Interstate Commerce Commission

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[1] The Interstate Commerce Commission takes no position on the issue of interest or how it should be calculated (see Railroads' brief at 5, 33-43; San Antonio's brief at 28, 40-43).

[2] The background of this dispute is set forth in some detail in this Court's opinion in *San Antonio, Texas v. United States*, 650 F.2d 49, 51-52, *clarified*, 652 F.2d 422 (1981), and in *Burlington Northern v. United States*, 103 S. Ct. 514 (1982).

[3] *San Antonio, Texas v. United States*, 631 F.2d 831 (1980).

decisions setting maximum railroad rates for coal transportation to San Antonio, Texas,[4] a dispute arose over the rate to be charged pending a final decision in the remanded proceeding. Although the court's decision had expressed no opinion as to whether the rate was too high or too low, San Antonio maintained that the effect of the decision vacating the ICC's maximum rate prescriptions was to reinstate or revive a prior rate prescription, known as "San Antonio I",[5] and, accordingly, unilaterally reduced its payments to that rate level. The railroads argued that San Antonio was obligated to continue to pay at the rate level set forth in their tariff, which was set at the maximum level permitted by the vacated ICC decision.[6] Among other actions taken to enforce payment of their tariff rate,[7] the railroads asked the court of appeals to clarify its decision as not restoring the *San Antonio I* rate.

While that petition was pending before the court of appeals, the ICC acted to resolve the dispute, at least prospectively, by ordering San Antonio to pay the tariff rate. *San Antonio, Texas v. Burlington Northern Inc.*, 364 I.C.C. 887, 896-97 (1981) (App. at 30, 39-40).[8] Although the Commission explained why, in its view, applicable legal precedents should lead the court of appeals to clarify

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[4] *San Antonio, Texas v. Burlington Northern*, 359 I.C.C. 1 (1978) (*"San Antonio II"*), *modified*, 361 I.C.C. 482 (1979) ("San Antonio III").

[5] *San Antonio, Texas v. Burlington Northern*, 353 I.C.C. 405 (1976).

[6] *San Antonio, supra*, 631 F.2d 831. The court held the maximum rate prescriptions "arbitrary and capricious" and "without defensible rationale.

[7] The various proceedings before the Commission are catalogued in *San Antonio v. Burlington Northern*, 364 I.C.C. 887, 888-91 (1981).

[8] "App." refers to the Appendix of Railroad Appellants filed February 13.

its decision as *not* restoring *San Antonio I*, *id.* at 892 n.3 (App. 35),[9] the Commission did not purport to decide that question directly, out of deference to the court of appeals, where the railroads' petition for clarification on that question was then pending. Nevertheless, the Commission formally vacated the *San Antonio I* order to the extent that it may have remained viable after the D.C. Circuit's remand decision and ordered San Antonio to pay the then current tariff rate, *id.* at 897 (App. 40). The Commission explained (*id.* at 892 (App. 35)) that "there is little reason to believe that the *San Antonio I* rate prescription, which was established five years ago expressly as an interim measure to permit the traffic to begin moving, is supported either by current cost data or by current legal standards." In addition, the Commission noted that there had been significant changes in the governing legal standards which had not been taken into account in prescribing the *San Antonio I* rate,[10] *id.* at 894 (App. 37). Finally, the Commission concluded that it would be unjust to the railroads to permit the *San Antonio I* prescription to govern during the interim period pending a final decision on remand, because if the Commission determined that the railroads were entitled to charge a higher rate, they would nevertheless be unable to collect it for that interim period. *Id.*

This Court denied San Antonio's application to stay the Commission's order, *San Antonio v. Burlington Northern*, 650 F.2d 49, *clarified*, 652 F.2d 422 (1981) and San Antonio has been paying the tariff rate ever since. However, during the period of approximately ten months be-

[9] The Commission acknowledged its prior inconsistent position on the issue and explained why it had been mistaken originally. 364 I.C.C. at 892 n.3 (App. 35).

[10] The Commission's original *San Antonio I* rate prescription ante-dated two major amendments to the Interstate Commerce Act, the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. 94-210, 90 Stat. 31 (1976) and the Staggers Rail Act of 1980 (Staggers Act), Pub. L. 94-448, 92 Stat. 1895 (1980).

tween the effective date of the D.C. Circuit's decision, when San Antonio reduced its payments to the *San Antonio I* level, and April 1981, when the Commission's order to pay the tariff rate became effective, a disparity of $19 million—the difference between the tariff rate and the rate actually paid—accrued.

In May 1981, the D.C. Circuit issued its clarification opinion, holding that the effect of its earlier order vacating the ICC's maximum rate prescription was to revive the *San Antonio I* rate. *San Antonio, Texas v. United States*, 655 F.2d 1341 (1981). The Commission and the United States joined the railroads in urging the Supreme Court to reverse that holding. On brief, the government argued, *inter alia*, that by reviving the Commission's outdated *San Antonio I* rate prescription, the court of appeals effectively established the rate at a level which the Commission had found (in San *Antonio IV*, *supra*) to be unsupported by then current cost data and legal standards, thereby violating well-established principles concerning the ICC's primary jurisdiction over rail rates. Brief for Federal Respondents at 12-13, 16-29. The Commission and the United States also argued that the D.C. Circuit's decision effectively rewarded San Antonio's unilateral decision to pay a rate other than the published tariff rate during the ten-month period at issue—a result that could not be squared with the "filed rate doctrine" which requires adherence to published tariffs by shippers and carriers alike.[11] *Id.* at 34-39.

The Supreme Court reversed the D.C. Circuit's clarification decision. *Burlington Northern, Inc. v. United States*, —— U.S. ——, 103 S. Ct. 514 (1982). The Court held (*id.* at 521):

> By entering an order declaring that the *San Antonio I* rate order was "revived" for the period June

[11] See, *e.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Pennsylvania R.R. v. International Coal Co.*, 230 U.S. 184, 197 (1913).

> 1980-May 1981 the Court of Appeals did that which we have said a federal court may not do: *i.e.*, freeze the rate that railroads charge shippers prior to a decision by the Commission as to what a reasonable rate should be.

The Court made it clear (*id.* at 522) that the *San Antonio I* rate prescription had no continuing independent force and effect following the court of appeals' decision vacating the *San Antonio II* and *III* orders:

> Since the Commission prescribed a rate in *San Antonio I*, the argument is that this is the rate the railroads must charge. We disagree. *San Antonio I* was by it terms limited to "continue in full force and effect until . . . further order of the Commission," 355 I.C.C. 418. Absent a contrary indication from the Commission, *San Antonio II* terminated the vitality of *San Antonio I*.
>
> * * *
>
> In striking the orders in *San Antonio II and III*, the court's action operated to leave in effect the rates file, under the Commission's authority pending the Commission's redetermination of a reasonable rate and subject always to reparations to protect the shipper should the Commission find that their rates were too high. [Footnotes omitted].

The Court found it unnecessary to address arguments concerning the filed rate doctrine, *id.* at 522 n.10.

After the Supreme Court denied a petition for rehearing filed by San Antonio, the railroads filed a motion for summary judgment in the district court. San Antonio filed a motion to continue holding the district court proceeding in abeyance, based on alleged pendency of certain issues before the D.C. Circuit. That motion was granted (App. 42). However, after the D.C. Circuit denied a request for further briefing before that court (App. 43), the district court ordered briefing to proceed (App. 45).

The Commission moved to intervene and filed a statement of position (App. 84), in which it asserted that the Supreme Court had decided the revival question in the *Burlington Northern* case consistent with the Commission's own view (see pages 2-3 above) and that, contrary to San Antonio's position, no referral to the Commission was necessary on the issue.

On December 6, 1983 the district court issued a memordanum opinion granting the railroad's motion for summary judgment (App. 89). The court agreed that the Supreme Court had held that the rate in effect during the disputed period was the tariff rate, not *San Antonio I*, *id.* However, the court stayed execution of its judgment pending a final decision of the Commission in proceedings before the Commission: "This shall be done in order not to interfere with the primary jurisdiction of the Commission to determine the reasonableness of the tariff rate for the period in question", citing *Burlington Northern*, *supra*, 103 S.Ct. at 521 (App. 90). On December 27, the court issued its judgment (App. 92) in accordance with that opinion.

SUMMARY OF ARGUMENT

Before the Supreme Court's decision in *Burlington Northern*, a genuine dispute existed as to which of two rates was the "applicable" rate; that is, whether San Antonio was obligated to pay the tariff rate or a lower rate, based on the possibility that a prior Commission rate prescription had been revived. That question of rate applicability has now been definitively answered. The Supreme Court held that the rate in effect was the tariff rate, not the *San Anontio I* rate, and the district court was correct in so reading the Supreme Court's opinion. San Antonio's contrary reading of the Court's decision as not deciding that issue, but requiring yet another referral to the Interstate Commerce Commission, is patently erroneous.

The district court erred, however, in staying execution of its judgment pending disposition of San Antonio's rate

reasonableness claims before the Interstate Commerce Commission. The effect is to prevent the railroads from collecting the concededly applicable tariff rate pending final disposition by the Commission of San Antonio's rate reasonableness claims. Ironically, the court's stay order has virtually the same practical impact as the injunction against collection of the tariff rate which issued from the same court and was vacated by this Court in *San Antonio*, *supra*, 650 F.2d 49.

Since the Supreme Court's *Burlington Northern* decision, San Antonio stands in the same shoes as other shipper complainants before the ICC. Absent action by the Commission to suspend or otherwise hold down rates pending final disposition of reasonableness claims, San Antonio should be obligated to pay the tariff rate like all others (subject, of course, to reparations should it ultimately prevail on its reasonableness claim).

The district court's stay, rather than preserving the ICC's primary jurisdiction, potentially frustrates that jurisdiction, by creating an incentive for others to withhold payment of tariff rates.

I.

THE DISTRICT COURT CORRECTLY READ THE SUPREME COURT'S DECISION IN *BURLINGTON NORTHERN* AS DECIDING THE RATE APPLICABILITY QUESTION; NO REFERRAL TO THE ICC IS REQUIRED

San Antonio argues (brief at 31-39) that the district court erred in deciding the rate application dispute without referring the question to the ICC. The argument is based on the district court's reading of the Supreme Court's opinion in *Burlington Northern* (App. 89) as having *held* that "the rate in effect for coal shipment for the period in question was the tariff rate filed under the authority of the [I.C.C.], not the *San Antonio I* rate as contended by Defendant." In San Antonio's view, the

Supreme Court decided only that the ICC should decide the question, but did not itself resolve the question.

San Antonio's reading of the Supreme Court's opinion is quite simply inconsistent with the language of the Court's holding. The Court held (103 S. Ct. at 522):

> In striking the orders in *San Antonio II* and *III*, the court of appeals' action operated to leave in effect the rates filed under the Commission's authority pending the Commission's redetermination of a reasonable rate and subject always to reparations to protect the shipper should the Commission find that these rates were too high.[12]

San Antonio is, in effect, arguing that the Supreme Court could not have decided that issue because the issue before the Court was *who* could decide such questions, the ICC or the courts, and the Court decided that such questions must be decided in the first instance by the ICC. There is and was, however, no need to refer the question of rate applicability to the Commission because the Commission had already made its views clear on the question of "[w]hat rate should San Antonio be paying?" In *San Antonio IV*, *supra*, 364 I.C.C. at 891-97 (App. 34-40), the Commission provided a detailed explanation of why, if the *San Antonio I* rate had been reviewed, it should not have any continuing effect.[13]

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[12] See also the language quoted above at pages 5-6.

[13] The same considerations that led the Commission to conclude that the *San Antonio I* rate prescription had no continuing validity as of April 1981 are applicable to the period that is directly at issue here. For example, in prescribing the *San Antonio I* rate in 1976, the Commission did not have occasion to consider two major, subsequently enacted amendments to the Interstate Commerce Act, the 4R Act and the Staggers Act. Both statutes contain provisions directly relevant to the Commission's ratemaking responsibilities in cases such as the *San Antonio* case. *Burlington Northern*, *supra*, 103 S.Ct. at 522 n.7. The Commission found that the fact that ratemaking criteria in the new legislation were not considered in arriving at its *San Antonio I* prescription in 1976 was a more than

Although San Antonio is correct in noting that the Commission declined to rule directly on the question of whether the court of appeals' decision had the effect of restoring *San Antonio I*, it made its view clear on how that question should be resolved. The Commission expressed its view that application of appropriate principles of primary jurisdiction "should lead the court [of appeals] to clarify its mandate as*n ot* resoring *San Antonio I*", *id.* at 892 n.3 (App. 35) (emphasis added). Moreover, the Commission argued before the Supreme Court, *inter alia*, that the court of appeals erred in reviving "an outdated ICC rate prescription" (Brief for Federal Respondents at 12) and that "the court of appeals imposed a rate policy different from that expressly established by the Commission" in *San Antonio IV*, *id.* at 23. There was no reason then, and there is no reason now, to refer the question to the ICC because the Commission's position has been made clear.

Finally, San Antonio's argument that "the district court's ruling on the merits deprives San Antonio of due process rights" is baseless. For the reasons discussed immediately above, the district court correctly read the Supreme Court's holding in *Burlington Northern* and thus, if any due process rights have been cut off, it was the Supreme Court's doing. Of course, that is not the case; San Antonio has quite obviously had ample opportunity to be heard on the rate applicability question.[14]

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adequate basis for declaring the prescription invalid in 1981. (364 I.C.C. at 894 (App. 37)).

[14] San Antonio's reliance on 49 U.S.C. 10327 (brief at 38) in this context is misplaced. The Commission will, of course, comply with the specific requirements of that section upon issuance of its decision on San Antonio's reasonableness complaint. No separate decision by the Commission on the rate applicability question is required by the statute.

II.

THE DISTRICT COURT'S STAY OF ITS JUDGMENT WAS NOT REQUIRED TO AVOID INTERFERENCE WITH THE ICC'S RATE REASONABLENESS JURISDICTION

The only reason offered by the district court for staying execution of its judgment for the railroads was that "[t]his shall be done in order not to interfere with the primary jurisdiction of the Commission to determine the reasonableness of the tariff rate for the period in question," citing *Burlington Northern*, *supra*, 103 S. Ct. at 521 (App. 90).[15] The court erred in invoking the Commission's primary jurisdiction because, if anything, the court's stay frustrates rather than aids that jurisdiction, by effectively sanctioning San Antonio's refusal to pay the tariff rate.

In *Consolidated Rail Corp. v. National Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 612 (1981), the Supreme Court held that "[t]he authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission." In this situation, the Commission has made clear its view that San Antonio should pay the tariff rate, pending a final decision on rate reasonableness.[16] See pages 3-4, 10 *above; San Antonio IV*, *supra*,

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[15] San Antonio, on brief, suggests additional bases for the district court's decision, including that the court was presented with evidence that "San Antonio's case for overcharges before the ICC was a compelling one on its merits" and that the district court was also presented with evidence that requiring payment would cause undue hardship to the citizens of San Antonio. San Antonio's own brief is the cited authority for its likelihood-of-success-on-the-merits argument, which should be weighted accordingly by this Court. Without conceding the hardships argument, it is nonetheless irrelevant. *See Pittsburgh, C., C. & St. L. Ry. v. Fink*, 250 U.S. 577, 582 (1919).

[16] As discussed above at page 10 & n.13, San Antonio's claim that the Commission has not directly ruled on the question of whether

364 I.C.C. at 891-97 (App. 34-40). The Commission explained that the *San Antonio I* rate level was unsupported by then current cost or legal standards and that it was inequitable to the railroads. Yet, by freezing the rate at that level pending a final decision on reasonableness by the Commission, the district court here has accomplished almost precisely what this court said the same court could not do by injunction in *San Antonio, supra*, 650 F.2d at 53, and what the Supreme Court said the court of appeals may not do: "freeze the rate that railroads charge shippers prior to a decision by the Commission as to what a reasonable rate should be." *Burlington Northern, supra*, 103 S. Ct. at 521.[17]

Those cases relied upon by San Antonio (brief at 24 & 25 n.21) in which the courts have invoked the primary jurisdiction doctrine to require (or not require) that certain questions be referred to the ICC are inapposite. Clearly, courts do and must refer issues such as applicability or reasonableness of rates to the Commission where resolution of the issue is necessary to a decision by the court and the issue is one within the Commission's primary jurisdiction. *E.g., United States v. Western Pacific R.R.*, 352 U.S. 59 (1956). However, in this case, the reasonableness of the rates was not an issue before the court and its resolution was unnecessary to decide the issue at hand, *viz*, rate applicability.

Several of the decisions do suggest that a stay of judicial proceedings may be appropriate pending a referral to the ICC concerning rate reasonableness. See

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San Antonio I was revived for the relevant period is irrelevant, first and foremost because the Supreme Court finally resolved the issue and also because that is precisely how the ICC advised the court of appeals and the Supreme Court that the question should be resolved.

[17] As the Court pointed out there, 103 S. Ct. at 521-22, the result is particularly inequitable in these circumstances because it requires the railroads to accept a rate of return which was found too low by the Commission in 1978.

e.g., Western Transp. Co. v. Wilson & Co., Inc., 682 F.2d 1227, 1232 (7th Cir. 1982); *Chicago, R.I. & Pac. R.R. v. Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385 (8th Cir. 1970). But in neither acse is the question of rate applicability pendente lite discussed, nor was the "filed rate doctrine" considered or applied. The doctrine requires the carrier to collect, and the shipper to pay, the tariff rate on file with the Commission, regardless of the underlying lawfulness of the rates. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1923); *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 197 (1913). The carrier "has not only the right but also the duty to recover its proper charges for services performed." *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 343 (1982). While a major consideration underlying the doctrine is the avoidance of discrimination, *id.* at 344,[18] it is "equally important to aid the efforts of a carrier in collecting published charges in full." *Lowden v. Simonds-Shields-Londsdale Grain Co.*, 306 U.S. 516, 520-21 (1939).

Finally, the district court's stay creates a broader potential interference with the Commission's primary juris-

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[18] San Antonio is correct in arguing (brief at 22-23) that not all reasons underlying the "filed rate doctrine" are applicable in this situation. For example, it is probably correct that no claim for discrimination under the Interstate Commerce Act, 49 U.S.C. 10741, could lie here, and, as a practical matter, the history of litigation between San Antonio and the railroads over this rate belies any suggestion of secret rebating or favoritism by the railroads through accepting less than the tariff rate. The parties are not in "cahoots." Nevertheless, the doctrine has a statutory basis under the Interstate Commerce Act. Under 49 U.S.C. 10761, a "carrier may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff. . ." There are civil and criminal penalties for receiving payment at less than the tariff rate. 49 U.S.C. 11902, 11903. See also *Western Transp. Co., supra*, 682 F.2d at 1231 ("Congress did not create a flexible standard for courts to apply in accordance with facts, equities, or economic realities of a particular case. It forbade carriers to receive any different compensation from the rate in the applicable tariff.")

diction—by establishing an incentive for shippers to file complaints with the Commission, while withholding payment of the tariff rates, in hopes that the federal courts would sanction such violations of the filed rate doctrine. Such a possibility would undermine the ratemaking scheme under the Act, which has reposed questions concerning the timing of railroad rate increases with the Commission, *Burlington Northern*, *supra*, 103 S. Ct. at 521.

CONCLUSION

The district court's decision granting the railroads' motion for summary judgment should be affirmed. The district court's stay should be set aside.

Respectfully submitted,

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No. 91-1496

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR
CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

ARGUMENT

In their opening briefs, petitioners and their *amici* demonstrated that (1) the Interstate Commerce Act's ("ICA") requirement that all rates be "reasonable," (2) the primary jurisdiction doctrine, and (3) this Court's decisions in *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956), and *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), all require trial courts to stay proceedings in which insolvent carriers seek rates higher than those they originally charged and collected and to refer to the ICC the question whether the rates sought are "reasonable." *Amici* also demonstrated that neither the Bankruptcy Code nor the principles underlying the Code require a different rule.

Respondents and their *amici* address each of these issues. In the end, however, they fail adequately to explain why the ICA, the primary jurisdiction doctrine, this Court's decisions, or the Bankruptcy Code requires petitioners to pay the higher rates that respondents seek prior to the ICC having an opportunity to determine the reasonableness of those rates. They fail, in short, to explain why petitioners, who paid the rates respondent CME charged at the time of shipment, and who never would have shipped goods at higher rates at that time, should now pay *additional* monies, with little or no chance ever of obtaining complete reparations, before the ICC determines whether the rates on file were statutorily "reasonable."[1]

1. Petitioners and their *amici* demonstrated that the ICA's core requirement that all rates must be "reasonable" requires that a shipper be permitted to raise the defense that the filed rates are unreasonable in an action by a carrier to collect additional fees. Brief of Petitioners ("Pet.") 8; Brief of *Amici* National Industrial Transportation League *et al.* ("NITL") 11-14; Brief of *Amici* United States and the Interstate Commerce Commission ("ICC") 16-18. Specifically, they demonstrated that the ICA's fundamental requirement that rates must be "reasonable" should be enforced first where, as here,

[1] At the outset, it is important to note that cases such as this do not, as respondents and their *amici* intimate, involve defenseless small carriers driven to bankruptcy by powerful shipping interests. *Amicus* P*I*E, for example, was "one of the nation's largest motor carriers" with "annual operating revenues of $500,000,000" and its "customer base was more than 300,000 shippers and receivers of general commodities." Brief of *Amicus* Lloyd T. Whitaker as Trustee for the Estate of Olympia Holding Corporation f/k/a P*I*E Nationwide, Inc. ("P*I*E") 3. Similarly, *amicus* Transcon was a "major motor common carrier with annual revenues in excess of $200 million." Brief of Leonard L. Gumport, Trustee of the Bankruptcy Estate of Transcon Lines ("Transcon") 1. And *amicus* American Freight System and its affiliates had "annual revenues of approximately 500 million." Brief of *Amicus* American Freight System, Inc. ("Am. Freight") 2.

the carrier charged and collected a rate substantially lower than the rate on file and the shipper cannot obtain a complete remedy, either because it is time-barred from seeking reparations or because the carrier most likely will be unable to pay reparations if ordered.[2]

Respondents and their *amici* address this argument obliquely. *First*, while conceding—as they must—that the statute requires rates to be "reasonable," they contend that the statute provides only two mechanisms for shippers to enforce this crucial requirement: 49 U.S.C. § 10708, which permits shippers to challenge the reasonableness of filed rates before they become effective, and 49 U.S.C. § 11705(b), which authorizes shippers to seek reparations after they have paid filed rates that they believe unreasonable. Brief for Respondents ("Opp.") 16-17; Brief of *Amicus* American Freight System, Inc. ("Am. Freight") 13; Brief of *Amicus* Lloyd T. Whitaker as Trustee for the Estate of Olympia Holding Corporation f/k/a P*I*E Nationwide, Inc. ("P*I*E") 8. Accordingly, they argue that shippers cannot, under any circumstances, enforce the statute's reasonableness requirement by way of a *defense*.

[2] Citing *Maislin Industries U.S., Inc.* v. *Primary Steel Inc.*, 110 S. Ct. 2759, 2769 (1990), respondents and their *amici* maintain, with mantra-like insistence, that the filed rate requirement is "utterly central" to the Act. *See* Brief for Respondents ("Opp.") 42; Transcon 4, 8, 9, 11, 12, 13. Constant repetition of this quotation is no substitute for sound analysis. While holding that the filed rate requirement is central to the ICA, this Court in *Maislin* also emphasized the critical importance of the Act's reasonableness requirement, and did not address the question of timing presented by this case. 110 S. Ct. at 2767 ("the filed rate is not enforceable if the ICC finds the rate to be unreasonable"). This Court's emphasis on "reasonableness" is not only required by the statute, but also is supported by sound policy considerations. The reasonableness requirement protects all shippers and consumers from the expense and economic inefficiency of unreasonably high rates. By contrast, the filed rate requirement as applied here principally protects inefficient carriers.

To support this claim, respondents and their *amici* argue that in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), this Court held that shippers could neither sue motor carriers for reparations nor raise the reasonableness defense in undercharge actions by motor carriers. Opp. 32-34. They then assert that when Congress amended the ICA in 1965 it legislatively overruled this decision only with respect to reparations. *Id.* at 34. Specifically, relying on the legislative history of the 1965 amendment, they argue that Congress intended to provide a cause of action for reparations, but that it did not intend to make the reasonableness defense available to shippers. *Id.* at 34-36.

Respondents' understanding of the legislative response to *T.I.M.E.* is erroneous. In *T.I.M.E.*, this Court held that, under the ICA as it was then written, a shipper sued for undercharges by a motor carrier could not raise the defense that the filed rates were unreasonable because the Act did not provide shippers with *any* post-shipment mechanism to enforce the reasonableness provision against motor carriers. Specifically, this Court held that, in contrast to the rights that shippers enjoyed with respect to rail and water carriers, the ICA did not permit shippers to seek reparations from motor carriers. 359 U.S. at 470. Throughout the decision, this Court considered the right to seek reparations and the right to raise the reasonableness defense as inextricably intertwined rights. See *id.* ("Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, *or to enable them to assert 'unreasonableness' as a defense* in carrier suits to recover applicable tariff rates") (emphasis added); *id.* at 472 ("if a shipper has a 'justiciable legal right' to recover *or resist* past motor carrier charges . . .") (emphasis added).

In response, Congress overruled the holding in *T.I.M.E.* and authorized shippers to challenge the reasonableness of past motor carrier rates. Specifically, the legislative history of the 1965 amendment makes clear that Con-

gress amended the Act to "restore a procedure formerly available to shippers which was set aside by the Supreme Court in . . . the *T.I.M.E.* case." H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2923, 2931. Respondents point to nothing, and there is nothing, in this legislative history to suggest that Congress intended to authorize shippers to challenge the reasonableness of past rates in an action for reparations but to preclude them from raising the issue of rate reasonableness as a defense when sued for undercharges.[3]

Second, respondents suggest broadly that the referral procedure advocated by petitioners is not only not mandated by the ICA but also that it threatens to undermine entirely the ICA's requirement that shippers pay the filed rate. Specifically, they suggest that the referral procedure would permit shippers in all instances to ship goods and to refuse to pay—at least initially—on the ground that the rate charged was unreasonably high. See Opp. 29-30 (referral rule would "foreclose *any* collection of filed rate charges from any shipper who claims rate reasonableness as a defense").[4] These fears are groundless. The referral procedure advocated by petitioners and their *amici* would permit shippers temporarily to withhold payment of the filed rate only where, as here,

[3] In any event, there is no suggestion in the legislative history that, in adopting the reparations provision in 1965, Congress intended to overrule this Court's 1956 decision in *Western Pacific*. Thus, even if Congress intended to limit shippers to an action for reparations in most instances, there is no evidence that Congress intended to close the exception to the pay-first "rule" that this Court identified in that case.

[4] *See also* Am. Freight 14 ("The procedure sought by the Petitioners and supporting *Amici* would permit non-payment of the legal rate pending a determination by the ICC of rate reasonableness"); Transcon 10 ("Under the 'filed opening bid' doctrine, the filed tariff rate would merely signify what the carrier proposed to receive as payment; the shipper would remain free at all times to object to the filed opening bid as unreasonable").

the carrier has charged and collected a rate lower than the filed rate. Referral is especially appropriate in this case, where the shipper cannot be assured of obtaining a complete remedy from the carrier that received full payment for the shipments. This procedure would not apply where carriers bill the filed rate at the time of shipment. In that situation, the shipper would be obligated to pay the filed rate. See 49 U.S.C. § 10743(a); NITL 14 n.6.

Finally, respondents and their *amici* also respond to petitioners' statutory argument by suggesting that the referral procedure frustrates the ICA's antidiscrimination norm. Opp. 29-30; Am. Freight 19. This contention is groundless. The referral procedure does not contribute to any discrimination against shippers. Under this procedure, just as under the pay-first procedure, any possible "discrimination" inherent in the rates paid will be cured when courts (in those cases in which the ICC finds the filed rates to be "reasonable") require shippers to pay undercharges plus prejudgment interest.

More fundamentally, Congress, by amending the ICA in 1980 to "promote competitive and efficient transportation services," 49 U.S.C. § 10101(a)(2), clearly expressed a preference for competition in the motor carrier industry. Pursuant to this mandate, the ICC has taken steps to foster more competitive pricing in the industry. See, *e.g.*, *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146, 150-52 (1984) (permitting carriers to negotiate rates and file them within 24 hours). Contrary to the intimations of respondents and their *amici*, the steps taken by the ICC do not conflict with the statutory provision governing discrimination, which bars only "unreasonable" discrimination. 49 U.S.C. § 10741(b). In any event, the legality of the ICC's policies fostering competition is not before this Court.[5]

[5] Respondents also suggest that the referral rule frustrates the other principal goal of the filed rate requirement, namely to assist carriers in meeting their cash-flow expectations. Specifically, they suggest that the pay-first rule must be followed, even under the circumstances of this case, to allow carriers to meet their cash-flow expectations so that they can remain solvent (or, in the event that they are operating under Chapter 11 of the Bankruptcy Code, continue their operations). Opp. 29-30. This assertion is not true. Where carriers charge a rate lower than the filed rate, they can reasonably expect—at least in the short term—only to receive the rate they charge. And, when shippers pay the rate charged—as in this case—the carriers' cash-flow expectations are fully satisfied. Thus, the pay-first rule advocated by respondents is not necessary, under the circumstances of this case, to satisfy the ICA's concern with carriers' cash flow.

2. Petitioners and their *amici* demonstrated in their opening briefs that the primary jurisdiction doctrine independently requires that the reasonableness issue be referred to the ICC in any undercharge action in which the shipper cannot be assured of obtaining a complete remedy in an action for reparations. Specifically, petitioners and their *amici* demonstrated that unless the reasonableness issue is referred to the ICC before a shipper is required to pay the filed rate to a carrier from whom it cannot obtain reparations, the ICC will be deprived of a meaningful opportunity to pass on the reasonableness of the rates—*i.e.*, an opportunity to pass on the reasonableness of the rates at a time when a reparations order will have some practical effect. Pet. 19-20; NTL 14-17; ICC 11-16.

In response, respondents make an extraordinarily strained argument that any action by a district court to stay an undercharge action actually *undermines* the primary jurisdiction of the ICC and is prohibited by this Court's decisions prescribing the relationship between the courts and the ICC. Specifically, respondents argue that the referral rule presumes that rates are unreasonable, Opp. 15, or that it requires courts to conduct at least a preliminary inquiry into the reasonableness of rates. Opp. 25. Accordingly, they argue that this rule is inconsistent with this Court's decisions in a line of cases from *Arrow Transportation Co.* v. *Southern Pacific Ry.*,

372 U.S. 657 (1963), to *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131 (1982). Respondents claim that these cases establish a rule that trial courts may not, under any circumstances, take any action with respect to rates other than to enforce those rates. Opp. at 18-23.

Respondents' argument—that a rule designed to ensure that the ICC has a meaningful opportunity to determine rate reasonableness prevents the ICC from exercising jurisdiction over rates—is ludicrous on its face. Where carriers are insolvent or where shippers are time-barred from seeking reparations, trial courts can *only* provide the ICC with a meaningful opportunity to determine the reasonableness of the rates if they stay their own proceedings and refer the reasonableness issue to the Commission. If they do otherwise, they may, in violation of the mandate of the ICA and the ICC, force shippers to pay, and allow carriers (or their creditors) to keep, rates that are not "reasonable."

More specifically, the referral rule that petitioners advocate is not predicated on an assumption that the filed rates are unreasonable. It is predicated only on the fact that the ICA requires rates to be "reasonable" and that the primary jurisdiction doctrine requires that the ICC have an opportunity to determine whether rates are "reasonable" at a time when that determination will actually affect the outcome of the dispute between the shipper and carrier. Nor does the rule that petitioners advocate require courts to make any preliminary determination of unreasonableness. Indeed, requiring a threshold showing of merit would be a waste of judicial resources and would infringe upon the ICC's primary jurisdiction to determine rate reasonableness questions in their entirety. NITL 25.

Even more fundamentally, nothing in the cases on which respondents rely suggests that trial courts cannot refer the question whether rates filed in the past—and, in most cases, rates that are no longer effective—*were* reasonable at the time they were in effect. All the cases

that respondents cite concern only the courts' authority to enjoin rates currently in effect or scheduled to take effect and, by extension, judicial authority to compel a carrier to maintain or alter rates with future effect pending disposition of an ICC proceeding.[6] Accordingly, these cases hold only that a suspension or stay of rates *for future shipments* interferes with the ICC's primary jurisdiction over rates. Conversely, contrary to respondents' suggestion, these cases do not support the proposition that courts may never stay *their own proceedings* to provide the ICC with an opportunity to determine whether *past* rates were "reasonable." A stay to determine the reasonableness of past rates does not in any way compel a carrier to maintain or alter its rates; it simply permits orderly adjudication of the enforceability of the rate by the administrative body vested with the authority to do so.

Moreover, at least two of the cases upon which respondents rely expressly support petitioners' contention that the relationship between the courts and the ICC should be

[6] In *Arrow Transportation Co.* v. *Southern Pacific Ry.*, 372 U.S. 658, 669-70 (1963), for example, this Court held that a district court could not enjoin an automatically scheduled rate reduction, because that would require the court to consider—and pass upon—the reasonableness of the rate at issue. Similarly, in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 822 (1973), this Court held that a court could not enjoin implementation of certain rates, even though it had determined that the ICC had not articulated its reasons for approving the new rates with sufficient clarity. In *United States* v. *SCRAP*, 412 U.S. 669, 690-92 (1973), this Court, relying heavily on *Arrow*, held that a district court lacked jurisdiction to suspend a rate increase pending a final decision by the ICC on the lawfulness of the rate. In *Consolidated Rail Corp.* v. *National Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 613 (1981), as in *Wichita Board of Trade*, this Court held that the trial court did not have authority either to revoke or enjoin a rate increase even though dissatisfied with the Commission's justification for permitting the increase. Finally, in *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131 (1982), this Court held that the primary jurisdiction doctrine prohibited the courts from suspending a rate approved by the ICC, even though the approval was, in the court's view, arbitrary and capricious.

structured to do justice to parties—whether carriers or shippers—that cannot obtain a complete remedy in a subsequent reparations action. In *Burlington Northern*, the Court made clear that the carriers—in that case railroads—should receive higher rates in large measure *because* shippers could always seek reparations: "[T]he equities favor allowing the railroads to charge more than the Commission may ultimately find reasonable *because* the Act gives the shippers a right to reparations while no such protection is given to carriers" (emphasis added). Likewise, this Court made clear in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 824 (1973), that shippers were not entitled to an injunction, in part, because they could seek reparations and thus were unlikely to suffer irreparable harm. In this case, the shippers are not assured of a complete remedy if they pay first. Thus, by parity of reasoning, *Burlington Northern* and *Wichita Board of Trade*, rather than prohibiting courts from referring cases such as this to the ICC, actually require referral.

3. Petitioners and their *amici* also demonstrated in their opening briefs that this Court's decision in *Western Pacific* requires trial courts to stay undercharge proceedings and refer the question of reasonableness to the ICC in cases, such as this one, in which shippers cannot be certain of obtaining a complete remedy in a separate, sequential reparations action. Pet. 7-9; NITL 21-22; ICC 12-13, 18.[7] In response, respondents point first to an

[7] In addition, *amicus* NITL demonstrated that, under this Court's decision in *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), the courts must defer to the ICC's choice of the most appropriate means of enforcing the statute—in this case, an opportunity to challenge the reasonableness of the rates prior to paying the filed rate. NITL 22-23. *See also* ICC 24 (ICC has discretion to craft appropriate remedies for violations of the statute). In response, *amicus* P*I*E contends that "[w]hatever the parameters of [the ICC's] implied power, it does not extend to creation of a 'remedy' that conflicts with the express non-discrimination provisions of the Code, the exclusive reparations remedy of the Act, and the filed-rate doctrine itself." P*I*E 11. This response begs the question. As demonstrated, the ICC's preferred choice of the most appropriate means of enforcing the statute does not conflict with any statutory provision, and indeed furthers the core mandate of the Act that rates charged and collected must be "reasonable." Accordingly, the remedy selected by the ICC is entitled to deference by this Court.

"unbroken" line of cases—extending over the 17-year period from 1907 to 1924—claiming that these cases establish an inviolate rule requiring shippers, in all instances, to pay first and seek reparations later. Opp. 12-16. These early cases do not help respondents' cause. As explained by *amicus* NITL, NITL 19, these cases—especially the leading case, *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913)—do not establish an absolute rule mechanically applicable in all cases, regardless of whether the carrier charged the filed rate, and regardless of the shipper's ability to obtain reparations. Indeed, in *International Coal*, unlike this case, the carrier billed and collected the filed rate, and the outcome of the dispute between the shipper and carrier did not turn on which procedure—pay-first or referral—was followed.[8]

[8] The other cases that respondents cite do not directly address the question of timing presented by this case. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907), for example, simply holds that the ICC, not the courts, is vested with the authority to determine rates and to adjudicate actions for reparations. Likewise, the principal holding in *Robinson* v. *Baltimore & Ohio R.R.*, 222 U.S. 506, 509 (1911), is that a holding by the ICC that rates are unreasonable is a prerequisite to seeking reparations in the courts. And *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 249 (1913), held that a court lacked jurisdiction to order reparations before the ICC had an opportunity to determine the legality of the challenged rates.

In support of this argument respondents also point to some early ICC decisions that respondents contend contradict the ICC's current position. Opp. 26-28. Like many of the court cases on which respondents rely, these early ICC decisions do not address the precise question of timing at issue here. Indeed, the more relevant ICC decision is *Glama Dress Co.* v. *Mid-South Transports, Inc.*, 335 I.C.C. 586, 588-89 (1969), in which the ICC found that it has the authority to decide rate-reasonableness issues asserted as a

Moreover, as *amicus* NITL explained, NITL 20, this Court underscored the limited applicability of the dicta in these early cases in its 1942 decision in *Crancer* v. *Lowden*, 315 U.S. 631 (1942). In that case, this Court strongly suggested that the pay-first approach was not required by the ICA, but was rather an equitable principle, applicable where, unlike this case, the carrier would be materially prejudiced by referral to the ICC and where the shipper could obtain a complete remedy following a reparations action. *Id.* at 636. Finally, and importantly, the limited applicability of the early decisions upon which respondents rely is underscored by the fact that all were decided prior to this Court's 1956 decision in *Western Pacific*. In that case, this Court made clear that referral to the ICC was required in circumstances analogous to the situation in this case *because* the shipper was barred from seeking reparations in a separate, sequential action. 352 U.S. at 62.

Respondent seeks to distinguish *Western Pacific* on the grounds that it applies only to the Government as shipper and, in any event, it was not a case about rate reasonableness. Opp. 23-24. This reading is entirely unsupported by the language of the decision itself. First, this Court did not suggest anywhere in its opinion that the Government was entitled to raise the reasonableness defense *because* the Tucker Act provided it with certain "unique" rights, including the right to set off overcharges against future payments.[9] To the contrary, in permitting

counterclaim in an enforcement action. In any event, there is no reason why the views of the ICC, the agency charged with administering the statute, cannot evolve in light of an altered Congressional mandate and changed circumstances in the industry.

[9] Respondents suggest that private shippers cannot be entitled to raise the reasonableness issue as a defense, otherwise "Congress would not have had to pass the Tucker Act to give the United States Government its 'unique right' to set off." Opp. 23 n.13. This is nonsense. Congress granted the Government, but not private shippers, the right to set off overcharges to relieve it, but not

the Government to raise the reasonableness defense and requiring referral of that defense to the ICC, this Court cited two reasons—the need to secure agency expertise and a desire to prevent the carrier from obtaining unreasonable charges "with impunity"—that fully support application of the same rule to private shippers. 352 U.S. at 71. Second, contrary to respondents' suggestion, the Court clearly considered *Western Pacific* to be a case about rate reasonableness. Indeed, in rebuffing the carriers' argument that the case merely raised issues of tariff construction, the Court expressly rejected as "artificial[]" the "distinction between the issues of tariff construction and of the reasonableness of the tariff as applied." *Id.* at 68.

Thus, properly read, *Western Pacific* plainly established the general, principled rule that referral to the ICC is required where a shipper cannot be assured of obtaining a complete remedy in a separate action for reparations. That rule governs this case and requires reversal.[10]

4. *Amicus* NITL demonstrated that no specific provision of the Bankruptcy Code governs this case because

private shippers, of the burden of filing anticipatory suits challenging the reasonableness of filed rates in every instance. *Western Pacific*, 352 U.S. at 74. This does not in any way imply that the Government did not have the right, or that private shippers do not now have the right, to raise the reasonableness defense in situations where the carrier did not charge the filed rate and now seeks to collect additional fees.

[10] In response to petitioners' *Western Pacific* argument, respondents rhetorically question why shippers should be protected against the risk of carriers' bankruptcy, while carriers must bear the risk of shippers' insolvency. Opp. 18. The answer is simple: Because shippers must pay the rate charged at the time of shipment, carriers can protect themselves against the risk of shippers' insolvency by charging the filed rate at the time they provide service. Carriers such as respondent CME that failed to charge the filed rate can also protect themselves, where necessary, by requesting that the district court or the ICC require a shipper to post a bond or place the funds sought in an escrow account. *See infra* n.14.

petitioners are not creditors of respondent CME. Nevertheless, NITL contended that the Code and common law principles underlying the Code fully support the rule permitting a shipper to defend against an undercharge claim by an insolvent carrier on the ground that the filed rates were unreasonable and to have that defense referred to the ICC. As NITL demonstrated, principles of bankruptcy law support this rule because the opposite rule would permit insolvent carriers, but not solvent ones, to retain rates that are not "reasonable," in violation of the maxim that a bankrupt entity may not obtain a "windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961). Moreover, as NITL demonstrated, the Code does *not* embrace a goal of increasing the pool of money available to creditors at all costs. Indeed, the Code generally favors setoff and recoupment of offsetting claims.

Respondents and *amici* raise two arguments with respect to the rules of bankruptcy.[11] *First*, they contend that the rule advocated by petitioners "amounts to punishing carrier[s] who can no longer afford to operate," Opp. 41, and is therefore "inconsistent with the Code's overriding policy prohibiting discrimination against a debtor," P*I*E 10. They also suggest that such "punishment" is neither "relevant" nor "rational" because "[t]he liquidation values of motor carriers' estates vary widely,"

[11] Respondents also argue that petitioners are not entitled to a setoff or to recoupment because the competing claims in this case did not arise prior to the petition for bankruptcy. Opp. 37-40. This argument reflects a misunderstanding of NITL's position. NITL quite clearly recognized that this case simply involves a claim by respondents for money and that, at this point, petitioners and respondents do not have offsetting or partially offsetting claims of any sort. Indeed, this fact forms the basis of NITL's contention that the Code does not govern this case. NITL argued only that the Code does not *require* shippers to pay first and, more generally, that it favors offsetting mutual claims.

id. at 11, and "assets *may* be available" to pay reparations. Brief of *Amicus* International Brotherhood of Teamsters ("Teamsters") 16 (emphasis added).

These contentions are misleading. Admittedly, the Code does prohibit both governmental units and private employers from engaging in certain discrete forms of discrimination against debtors. For example, governments may not deny a license, a permit or a charter to a debtor, and employers may not discriminate against a debtor with respect to employment. 11 U.S.C. § 525. The Code, however, does not prohibit all forms of differential treatment of bankrupt entities, particularly differential treatment predicated on the debtor's current or future financial stability. See, *e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6126 ("the prohibition [of Section 525] does not extend so far as to prohibit . . . the examination of prospective financial condition"); *In re Norton*, 867 F.2d 313, 316-17 (6th Cir. 1989); *In re Richardson*, 27 B.R. 560, 564 (E.D. Pa. 1982) ("Unquestionably, Section 525 . . . can not be interpreted so as to preclude [an entity] from making reasonable inquiry into the future financial responsibility" of the debtor).

In any event, the referral procedure advocated in this case is not, in any meaningful sense, punitive. Under this procedure, insolvent carriers, like solvent carriers, will ultimately receive all that they are entitled to under the statute—"reasonable" rates. And, under this procedure, but not the pay-first procedure advocated by respondents, bankrupt carriers, like solvent ones, will be precluded from retaining any monies to which they are not legally entitled.

Finally, the referral procedure is not discriminatory. It should govern *all* cases in which the shipper cannot be assured of a complete remedy, either because it is time-barred from seeking reparations or because the carrier—whether solvent or insolvent—is unlikely to be able to pay full reparations. Moreover, to the extent that it

disproportionately affects insolvent carriers, this differential effect is justified by the entirely rational assumption that insolvent carriers are, as a general matter, less likely than solvent carriers to pay full reparations if the rates they seek to enforce are deemed unreasonable by the ICC. Thus, while some insolvent carriers continue to operate under the protection of Chapter 11, and while some insolvent carriers might theoretically be able fully to repay all of their creditors including those who are unsecured, it is plainly both "relevant" and "rational" to treat carriers that are unlikely to be able to pay reparations differently when establishing a rule governing the order of payment of alleged undercharges and the repayment of reparations.

Second, respondents and their *amici* argue that the delay in payment associated with the referral procedure is unwarranted because "bankrupt carriers are badly in need of funds to pay creditors," Opp. 41, and because some Chapter 11 debtors will be forced to liquidate their assets, P*I*E 12. Indeed, *amicus* International Brotherhood of Teamsters contends that this delay would interfere with bankruptcy trustees' duties to "marshal assets" and "maximize the value of the estate for creditors." Teamsters 14.

To be sure, the referral procedure will delay the transfer of monies from shippers to carriers in those cases in which the ICC ultimately determines that the filed rates were not unreasonable. Such delay, however, is entirely legitimate. Insolvent carriers such as CME are ordinary claimants, seeking judgments against entities over which the bankruptcy courts have no jurisdiction, and they are not entitled to prevail on their claims if the rates they filed were not "reasonable." As such, they, like all other civil claimants, must await the outcome of the claims process, including referral of the reasonableness issue to the ICC, before they can collect the monies to which they lay claim. Cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (bankruptcy courts constitutionally prohibited from exercising jurisdiction over matters unrelated to "the restructuring of debtor-creditor relations which is at the core of the federal bankruptcy power"); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 63-64 (1989) (delay in bankruptcy proceedings must be tolerated where Constitution requires that certain procedures be followed).[12]

5. Several of respondents' *amici* suggest that it is unnecessary to refer the reasonableness issue to the ICC in cases such as this one because both district and bankruptcy courts have broad discretion to establish mechanisms to protect any monies that shippers pay carriers in those instances in which the courts believe that carriers may not be able to pay reparations. Specifically, *amicus* International Brotherhood of Teamsters suggests that district courts can "hold [the undercharges] pending a determination of rate reasonableness by the ICC," Teamsters 16, and *amicus* P*I*E suggests that a bankruptcy court could "require the trustee to take steps to preserve shipper payments of the filed rate, when received, pending final outcome of any reparations action the shipper initiates." P*I*E 17.[13]

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[12] The argument that the *creditors* of insolvent carriers need, and would receive promptly, any additional funds paid by shippers to carriers heavily underscores the reasonableness of distinguishing between carriers that are in a position to pay reparations and those that are not when establishing the rules governing payment and reparations in cases such as this one. Indeed, it is highly inconsistent for respondents and their *amici* to make clear that any monies collected will be disbursed promptly to creditors and simultaneously to assert that funds will be available to pay reparations.

[13] Similarly, *amicus* Transcon, citing Rule 67 of the Federal Rules of Civil Procedure, suggests that shippers can "fully preserve [their] ability to recover reparations by paying the filed rate into [a] registry of the court." Transcon 6. This suggestion is odd. "Rule 67 is a rather unimportant rule," the purpose of which is to relieve depositors of responsibility for a fund in dispute such as in an interpleader action. C. Wright & A. Miller, 12 Federal Practice & Procedure § 2991, at 50-51 (1973). Thus, there is

These arguments make little sense. Payment of funds into court registeries or escrow accounts will not facilitate the adjudication of the reasonableness defense, cure carriers' cash flow problems, or provide relief to "needy" creditors.[14] More important, shippers are statutorily *entitled* to retain any monies that carriers claim pursuant to unreasonable rates. Accordingly, their right to retain these monies or to be assured of reparations should not be subject to the discretion of the courts. Finally, many shippers may themselves be bankrupted if they are required to pay into escrow the rates claimed by carriers—which far exceed the rates at which the shippers would have agreed to ship goods. Absent some evidence in the statute that such a result is required, it makes no sense at all to impose this obligation.

* * * *

In sum, the ICA requires both that rates be "reasonable" and that carriers charge, and shippers pay, the filed rates. A well-established rule requires shippers to pay the filed rate first and seek reparations later when carriers demand the filed rate at the time of delivery. However, no cases hold that where, as here, a carrier willingly charged and collected a rate substantially lower than the filed rate, the filed rate must be tendered as the cost of admission to a hearing before the ICC to determine whether the filed rate is "reasonable." In such cases, particularly where the shipper cannot reasonably be assured of obtaining a complete remedy, it is antithetical to the ICA's requirement that all rates be "reasonable," to the primary jurisdiction doctrine, to this Court's decisions construing the Act, and to the principles of public policy embodied in the Act, to require shippers to pay carriers additional monies before they have an opportunity to have the reasonableness of the filed rates determined by the ICC.

little or no precedent for its use in situations like the one in this case.

[14] Payment into such accounts will, of course, guarantee that carriers get paid if the ICC determines that the filed rates were in fact reasonable. It is not necessary, however, to establish such accounts in all cases. In the unusual situation where a carrier has reason to believe that a shipper will not be able to pay a judgment, then it can request that the court or ICC establish an escrow account. Certainly the ICC has the authority pursuant to its equitable powers to establish such accounts. *Cf. ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984).

CONCLUSION

For the foregoing reasons, and those stated in the opening briefs of petitioners and their *amici*, the decision of the court of appeals should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1992

PETER C. REITER, ET AL., PETITIONERS

v.

LANGDON M. COOPER, TRUSTEE
for CAROLINA MOTOR EXPRESS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, in an action by an insolvent motor carrier to collect undercharges based on the tariff rate, the shipper must pay the tariff rate prior to a determination by the Interstate Commerce Commission of the reasonableness and lawfulness of that rate, even though the motor carrier's insolvency precludes satisfaction of any subsequent reparations order.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1496

PETER C. REITER, ET AL., PETITIONERS

v.

LANGDON M. COOPER, TRUSTEE
for CAROLINA MOTOR EXPRESS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission (ICC or Commission) administers the Interstate Commerce Act (Act), 49 U.S.C. 10101, *et seq.* The United States is frequently a party to actions involving the application of the Act, 28 U.S.C. 2322, 2323, and has been a party in cases involving the issue in this case. *See, e.g., Rebel Motor Freight, Inc.* v. *ICC*, 933 F.2d 1009 (Table), cert. denied, 112 S. Ct. 617 (1991). Under the primary jurisdiction doctrine, it has long been recognized that courts must refer to the Commission issues arising under the Act that require

application of agency expertise or the explication of transportation policy. This case involves the application of that principle in the context of a lawsuit by a trustee for an insolvent motor carrier seeking to enforce the tariff rate against a shipper. The Fourth Circuit held that the filed rate doctrine prohibits a district court from staying the tariff collection action pending referral to the Commission for a decision on whether the tariff rate is unreasonable under the Act. Because the court of appeals' holding seriously misapplies the primary jurisdiction doctrine, interferes with the Commission's enforcement of the rate-reasonableness requirement of the Act, and threatens to burden shippers with unjustified charges, the United States and the Commission have a significant interest in the outcome of this case.

STATEMENT

A. 1. Since 1935, the Commission has regulated interstate transportation by motor carriers. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543. A motor common carrier providing transportation subject to regulation under the Act must publish its rates in tariffs filed with the ICC. 49 U.S.C. 10761(a), 10762(a)(1). In order to protect shippers against discriminatory rates, the Act further provides that a carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a).

The Act also requires that a carrier's rates and practices be reasonable. 49 U.S.C. 10701(a). If the ICC determines that a carrier is charging an unreasonable rate or is engaging in an unreasonable practice, the ICC "shall prescribe the rate * * * or practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1). A carrier is also liable for damages for imposing rates that the Commission finds to be unreasonable. 49 U.S.C. 11705(b)(3). The exclusive authority to declare a rate or practice to be unreasonable belongs to the ICC. 49 U.S.C. 11705(b)(3), 10704(b)(1); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440-441 (1907).

In a series of early cases under the Interstate Commerce Act, this Court developed the principles that later became known as the "filed rate" doctrine. Under that doctrine, when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain a defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate. See, *e.g.*, *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & Pacific Ry.* v. *Mugg*, 202 U.S. 242, 245 (1906); *Gulf, C. & S.F. Ry.* v. *Hefley*, 158 U.S. 98 (1895). As originally formulated, the primary purpose of the filed rate doctrine was to reinforce the statutory prohibition against rate discrimination. See *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922). In addition, by prohibiting courts from inquiring into the reasonableness of a tariff rate, the filed rate doctrine protects "the agency's primary jurisdiction over reasonableness of rates." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981); *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932).

2. In the Motor Carrier Act of 1980 (MCA), Pub. L. No. 96-296, 94 Stat. 793, Congress substantially revised the transportation policy of the United States to encourage a more competitive environment in the motor carrier industry. Among other things, the MCA significantly relaxed restrictions on entry into the motor carrier industry. 49 U.S.C. 10922. During the 1980s the number of licensed motor common carriers more than doubled.[1] The intensified competition, however, coupled with other economic factors, produced an increased number of motor carrier bankruptcies.

When a carrier goes into bankruptcy, its receiver or trustee typically retains an auditor to search the records of the carrier for instances in which the charges that the carrier billed and collected were lower than the applicable

[1] In 1980, there were approximately 17,000 regulated motor common carriers. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 2 (1980). In 1990, there were more than 44,000 such carriers. 1990 ICC Ann. Rep. 113, App. E, Table 1.

rates set forth in tariffs filed with the ICC. When discrepancies are found, the receiver or trustee files a collection action to recover the difference from the shipper. A significant number of carriers have filed such undercharge actions against shippers who relied upon the competitive rates that the carriers had offered, billed, and collected, but had not filed in tariffs as required by law. See *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

In response to those developments, the ICC formulated its *Negotiated Rates* policy, concluding that such solicitation and billing activities constituted an unreasonable practice, in violation of 49 U.S.C. 10701(a), when four defined criteria were met.[2] In *Maislin*, this Court held that the *Negotiated Rates* policy, by allowing the agreement of the parties to prevail over the tariff rate, "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular." 110 S. Ct. at 2768. The Court reaffirmed, however, that "[t]he filed rate doctrine * * * contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Id.* at 2767.

B. 1. Collection actions similar to those before this Court in *Maislin* continue to be brought. Thousands of shippers (including large corporations, small businesses, and individuals who received single shipments c.o.d.) are receiving rate rebillings, for claims ranging from less than $100 (for one-time shipments) to as much as $8 million for shippers that were regular customers of the now-defunct carriers. Many shippers have contended that the tariff rates asserted by the bankrupt motor carriers and their collection agents are in violation of the Act's requirement of reasonable rates, and have requested

[2] See *National Indus. Transp. League—Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

courts to refer the rate-reasonableness issue to the ICC for determination, prior to adjudicating the undercharge claim.[3] The bankrupt motor carriers and their collection agents, however, have objected to referral and have claimed that the filed rate doctrine requires shippers to pay the tariff rate first and then initiate a separate reparations action to determine the reasonableness of that rate.[4]

The ICC addressed those issues in *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61 (1991). The ICC noted that in *Maislin*, this Court stated that when the ICC finds that a rate is unreasonable, the filed rate is "not enforceable." 8 I.C.C.2d at 66. The ICC further noted that the Commission alone has jurisdiction to determine whether a carrier's rate is unreasonable. *Id.* at 67. The Commission then analyzed the issue of whether the filed rate doctrine bars referral to the ICC of the rate-reasonableness issue and requires shippers to pay the tariff rate first and seek reparations later. Noting that "most of the carriers now bringing undercharge actions are bankrupt, and

[3] Referrals to the ICC have also been sought to address claims that the filed rates are unlawful for other reasons, such as failure to comply with statutory requirements governing the extension of credit, see *Delta Traffic Serv., Inc.* v. *Mennen Co.*, 730 F. Supp. 1309 (D.N.J. 1990), aff'd, 919 F.2d 134 (3d Cir. 1990) (Table), or failure to satisfy publication requirements, see *ICC* v. *Transcon Lines*, No. CV-91-5036 (C.D. Cal. Nov. 27, 1991), aff'd in part and rev'd in part, No. 92-55036 (9th Cir. June 17, 1992).

[4] The ICC is aware of at least 186 motor carriers that have filed claims against shippers based on the existence of higher tariff rates than the unfiled rates that were negotiated. The difference between the two is often substantial. Nearly 200 rate-unreasonableness cases are pending before the ICC, involving an estimated $10 million in undercharges. The Chairman of the ICC advised Congress that published estimates of undercharge liability in cases where the tariff did not reflect the rate originally billed range from $200 million to as much as $1 billion. *ICC Freight Motor Carrier Oversight: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. 5 (1991).

shippers in all likelihood would not be able to collect from them reparations ordered," the Commission concluded that "[w]here the motor carrier is insolvent and hence unable to satisfy any subsequent reparation order, enforcement of the filed tariff without referral to the ICC would undermine the meaningful exercise of our unreasonable-rate jurisdiction and would deny the shipper an adequate remedy." *Ibid.* The ICC further explained that the carrier is not justified in insisting on immediate payment when it cannot pay reimbursement if the rate is found to be unreasonable. *Ibid.*

The Commission then determined that the filed rate doctrine does not require payment prior to referral to the ICC. The primary purpose of the filed rate doctrine is to prevent rate discrimination accomplished through unpublished rebates, but that purpose would not be served by denying referral to the ICC, because "[t]here is no possibility of a defunct carrier unlawfully discriminating for or against any shippers while the rate reasonableness challenge is being resolved." 8 I.C.C.2d at 68. Moreover, while it is a purpose of the filed rate doctrine to enable prompt collection of charges in order to maintain "a stable transportation system," that purpose is not furthered when the "carrier is no longer operating." *Ibid.* The Commission also rejected the claim that the Act has been interpreted to require "separate, sequential litigation" of the rate-reasonableness issue. *Id.* at 68-72. Based on a review of relevant decisions, the Commission stated that "courts have frequently referred rate reasonableness issues (or given effect to ICC rate reasonableness rulings) prior to the payment by the shipper." *Id.* at 70. In light of the accepted practice of referral "prior to payment of the filed rate," the Commission found ample support for the view that "referral is permitted under a normal, unstrained reading of the statute." *Ibid.*[5]

[5] The Commission also outlined the criteria it generally applies to claims that a rate is unreasonable, noting that "[a]lthough there is no single fixed test," factors traced in past decisions include "(a) relevant rate comparisons, (b) a carrier's proffer of a particular rate, (c) whether the rate would have moved the traffic had it been assessed at the time the shipment took place, (d) the class rates for like traffic, and (e) tariff analysis." 8 I.C.C.2d at 74. After elaborating on those factors, the ICC concluded that issuance of a formal policy statement would not be appropriate because the general standards for finding a rate to be unreasonable are marked out by the case law, and development of those standards is primarily a matter of application to particular factual records. *Id.* at 79.

C. 1. Prior to its bankruptcy, Carolina Motor Express, Inc. (Carolina) operated as a certificated motor common carrier subject to ICC regulation. Petitioners California Consolidated Enterprises, Inc. (CCE) and Peter C. Reiter (Reiter) are both brokers of motor carrier transportation; that is, they arrange transportation by motor carriers for the shipping public. Carolina agreed to supply transportation services to petitioners at particular rates. Petitioners believed that Carolina would publish the quoted rates in its tariffs on file with the ICC. Carolina thereafter provided the services, and billed and collected at the agreed rates, but failed to file the negotiated rates in its ICC tariffs. Pet. App. 29a-32a, 91a-98a.

After Carolina's bankruptcy, respondent Langdon M. Cooper was appointed trustee for the estate. The estate hired respondent Mark & Associates to audit Carolina's freight bills. The auditor determined that the difference between the rates Carolina had originally charged petitioners and the rates that Carolina had on file with the ICC totaled $58,793.03 for CCE and $13,795.73 for Reiter, and submitted bills in those amounts. Pet. App. 31a, 33a-34a, 58a, 65a.

2. After petitioners refused to pay the additional charges, respondents instituted collection actions in the United States Bankruptcy Court for the Western District of North Carolina. Petitioners answered that the rates sought to be collected were unreasonable and unlawful, that collecting higher charges than those agreed upon constituted an unreasonable practice in violation of 49

U.S.C. 10701, and that the rates sought did not apply to the traffic at issue. Pet. App. 25a-26a, 56a-57a, 90a. Both petitioners also moved for referral of the cases to the ICC. *Id.* at 27a, 58a.

The bankruptcy judge denied the motions for referral on the basis of his interpretation of the filed rate doctrine. Instead, finding no factual dispute, the judge entered final judgment in favor of respondents. Pet. App. 86a-140a. The district court, sitting in review of the bankruptcy judge's decision, reversed. Relying on the ICC's *Negotiated Rates* policy statement, the district court stayed the collection actions and referred the cases to the ICC. Pet. App. 76a-85a.

3. Respondents appealed the district court's referral order to the court of appeals, which held the appeal in abeyance pending this Court's consideration of the *Negotiated Rates* issue in *Maislin*. Following *Maislin*'s invalidation of the *Negotiated Rates* policy, the court of appeals vacated the district court's referral orders. Pet. App. 6a. The court went on to address petitioners' claim that the cases should be remanded with instructions to refer them to the ICC for a determination of whether Carolina's tariff rates were unreasonable. After concluding that petitioners had properly preserved that claim, the court, by a 2-1 vote, held that the filed rate doctrine precludes referral. *Id.* at 6a-7a, 12a.

The court interpreted the filed rate doctrine to require shippers to pay the filed rate first and seek reparations later. Pet. App. 7a. If shippers could obtain automatic referral to the ICC, the court said, it would provide a strong incentive to raise reasonableness defenses routinely in order to delay payment of the filed rate. That result, the court concluded, is "wholly inconsistent" with the filed rate doctrine, which entitles carriers to receive payment of the filed rate immediately when due. *Id.* at 7a-8a. Moreover, the court reasoned that shippers are charged with knowledge of the tariff rate, and should not wait until sued by trustees to challenge its reasonableness. If they do wait, however, they may file a reparations action.[6] *Id.* at 8a-9a. The court of appeals believed that its decision accorded with this Court's "longstanding insistence" upon "strict adherence" to the filed rate, which was of "considerable importance" in the "prevention of the secret and discriminatory negotiated freight rates which were the plague of common carriers in times past." *Id.* at 9a.

Judge Hall dissented, stating that the rate-reasonableness issue should have been referred to the ICC as a matter within the primary jurisdiction of the Commission. Pet. App. 11a-16a. Relying on the analysis in *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101, 104-107 (1st Cir. 1990), Judge Hall noted that courts have historically referred such issues to the ICC. Pet. App. 13a. He also disagreed with the majority's suggestion that permitting referral would encourage routine challenges that would delay payment, because the law provides sanctions against frivolous filings and because courts can require shippers to make a threshold showing of unreasonableness before referral. *Id.* at 14a. Finally, the dissent expressed concern that, because of a carrier's bankruptcy, shippers frequently will be unable to obtain an adequate remedy if they must pay the filed rate first and are relegated to a later reparations action. *Id.* at 14a-15a.

SUMMARY OF ARGUMENT

A. The primary jurisdiction doctrine requires challenges to the unreasonableness of a carrier's rates or

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[6] See 49 U.S.C. 11705(b)(3). Under that provision, a shipper must file a claim in court, whereupon the court refers to the Commission the issue of reasonableness. See *Informal Procedure for Determining Motor Carrier and Freight Fowarder Reparation*, 335 I.C.C. 403, 412-413 (1969). The court of appeals recognized that, because the carrier in this case is in bankruptcy, a reparations remedy is likely to result only in the shipper's being "paid a pro rata share of his claim along with the carrier's other unsecured creditors," but nevertheless found that the Bankruptcy Code provides "adequate relief" for a shipper. Pet. App. 10a n.4.

practices to be adjudicated by the Interstate Commerce Commission. When an issue that comes under the primary jurisdiction of the ICC arises in a court action, it is appropriate for the court to stay its proceedings and refer the matter to the ICC. Those principles have led this Court and others to conclude that when a challenge to the reasonableness of a carrier's tariff rates arises during an undercharge action, it is appropriate to stay judicial proceedings and to refer the unreasonableness claim to the ICC.

B. The filed rate doctrine does not bar referral to the ICC of a rate-unreasonableness defense in the present context. The filed rate doctrine holds that neither the shipper's ignorance of the tariff nor the negotiations of the parties can prevail over the filed rate. As this Court reaffirmed in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759, 2767 (1990), however, the filed rate doctrine is subject to a critical caveat: when the ICC finds that the tariff rate is unreasonable, that rate is "not enforceable." That rule is necessary to harmonize the filed rate doctrine with the co-equal statutory requirement that a carrier's rates must be reasonable.

That caveat to the filed rate doctrine provides the governing principle here. Referral to the ICC of a rate-unreasonableness claim is not incompatible with the filed rate doctrine because that doctrine has always recognized that the ICC has power to declare a filed rate to be unreasonable and therefore unenforceable. No provision of the Interstate Commerce Act prohibits a court from staying an undercharge action pending a referral to the ICC for a ruling on the reasonableness of the rates. Nor are the purposes of the doctrine—to prevent discrimination and to assist a carrier in collecting its charges—furthered by a rigid prohibition against referral to the Commission in the present context. Finally, this Court's decisions do not prescribe a rule that invariably requires shippers to pay the tariff rate first, and seek reparations later.

To interpret the filed rate doctrine to erect a per se barrier to referral would defeat the goals of the Act when

the carrier is enmeshed in bankruptcy proceedings. The defunct carrier suffers no prejudice from a stay of the collection action and referral to the ICC. On the other hand, without a prior referral, the shipper would lack an adequate remedy for a claim of unreasonableness, because a subsequent reparations proceeding against a bankrupt carrier offers no realistic promise of relief.

Judicial action that has an impact on ICC-regulated rates should be structured to preserve the agency's primary jurisdiction and to protect parties unable to benefit from a subsequent reparations proceeding. *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982). Moreover, it is the ICC that has primacy in determining the remedies that are appropriate for a carrier's violation of the requirement of reasonable rates. Here, those principles strongly suggest that courts should not blindly enforce the tariff rate without prior referral of a rate-unreasonableness defense to the ICC.

C. The court of appeals interpreted the filed rate doctrine to prescribe a strict bar against referral to the ICC of a rate-unreasonableness defense. Because that holding is erroneous, and because referral is appropriate and justified when the shipper makes a threshold showing of unreasonableness in defense of an undercharge action by a bankrupt carrier, the case should be remanded for further proceedings.

ARGUMENT

THE COURT OF APPEALS ERRED IN REFUSING TO REFER TO THE ICC THE SHIPPERS' CLAIM THAT THE TARIFF RATE IS UNREASONABLE

A. The Primary Jurisdiction Doctrine Supports Referral To The ICC Of A Claim That A Tariff Rate Is Unreasonable

The primary jurisdiction doctrine requires that "[w]henever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern*

Ry. v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). The doctrine protects the uniform development of policy by the ICC and ensures the application of agency expertise to questions requiring familiarity with the regulated industry. *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 255-259 (1913); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956); *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 580 (1966); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976). The doctrine has particular force with respect to a claim that a carrier's rates are unreasonable, because a key purpose of the Interstate Commerce Act is to provide for centralized administration in the ICC of regulation of the reasonableness of rates. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440-441 (1907); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 196 (1913).

Drawing on those principles, courts have frequently referred rate-reasonableness issues to the ICC prior to enforcing the tariff rate against shippers in collection actions. For example, in *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956), carriers sued the shipper (the United States) in the Court of Claims for additional charges under the carriers' filed tariffs. The United States defended by arguing that the tariff asserted did not apply, and that "if this tariff item was held to govern, the tariff would be unreasonable as applied to these shipments." *Id.* at 61. The government also asked the court to stay proceedings and to refer its defense to the ICC. *Id.* at 61-62. This Court agreed, holding that under the primary jurisdiction doctrine, both the construction of the tariff and the question of its reasonableness were matters that should be referred to the Commission in light of the particular facts. *Id.* at 65-70. The Court rejected the carriers' argument that referral of the government's defense was prohibited because the applicable two-year statute of limitations barred the government from affirmatively seeking reparations for unreasonable rates. *Id.* at 70-74. The Court explained that "[o]nly the clearest

congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit." *Id.* at 71.[7]

Later decisions follow the same course. In *Pennsylvania R.R.* v. *United States*, 363 U.S. 202 (1960), a railroad sued the United States to recover additional charges, and the government challenged the reasonableness of the rates. This Court stated that the district court had "[p]roperly rel[ied] on our holding in *United States* v. *Western Pacific R. Co.*" in "suspend[ing] proceedings to enable the parties to have the [ICC] pass on the reasonableness of the rates." 363 U.S. at 203. Similarly, in *Chicago, Rock Island & Pac. R.R.* v. *Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385, 386-389 (8th Cir. 1970), a railroad sued for additional unpaid freight charges and the shippers claimed the rates were unreasonable. The court of appeals held that the district court was required to stay its hand until the ICC had reached

[7] Respondents argue that *Western Pacific* is inapplicable in this case because the government (unlike private shippers) need not abide by the filed tariff rate. Br. in Opp. 8-9, citing former 49 U.S.C. 66 (1976) (recodified at 31 U.S.C. 3726). Although the government does enjoy the unique right to set off claimed overcharges against subsequent bills and to raise estoppel defenses, see 352 U.S. at 74, 76 & n.20, the Court's reasons for requiring referral in *Western Pacific*—to secure agency expertise and to avoid the unfairness of allowing the carrier to collect potentially unreasonable rates with impunity—are equally applicable to private shippers in the present context. Indeed, relying on *Western Pacific*, courts have regularly stayed undercharge actions and referred rate-unreasonableness claims to the ICC at the behest of private shippers. See pp. 13-15, *infra*. Respondents also claim that *Western Pacific* is distinguishable because it involved a "technical" issue of tariff application. Br. in Opp. 9. *Western Pacific* did raise both a tariff construction and an unreasonable-rate issue, but the Court made clear that it was precisely *because* the tariff-construction issue raised complex issues akin to determining the reasonableness of a rate (*i.e.*, the analysis of costs underlying particular shipments) that the primary jurisdiction doctrine required referral of *both* issues to the ICC. 352 U.S. at 65-70.

a final decision. "The issue is the reasonableness of the railroad rate involved, and so far as we know every court holds that this is a subject for initial determination by the Commission." *Id.* at 387. See also *Union Pacific R.R.* v. *Bay Area Shippers Consolidating Ass'n*, 594 F.2d 1291, 1294-1295 (9th Cir. 1979) (per curiam) (railroad sought additional freight charges in district court litigation; court of appeals held that the lower court was required to refer to Commission the issue of whether the rate was reasonable); *Western Transp. Co.* v. *Wilson & Co.*, 682 F.2d 1227, 1231-1232 (7th Cir. 1982) (requiring referral to Commission of a defense in an undercharge case that a tariff's notation requirement was unreasonable).[8]

In cases following this Court's decision in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), the courts of appeals, with the sole exception of the court below, have similarly required referral. In *Maislin*, this Court rejected the ICC's *Negotiated Rates* policy, but confirmed that the filed rate is "not enforceable" when the ICC finds that the tariff rate is unreasonable; the Court then noted that "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand." 110 S. Ct. at 2767 & n.10. In keeping with that statement, and the requirements of the primary jurisdiction doctrine, the majority of the courts of appeals that have addressed the issue have referred rate-unreasonableness issues to the ICC in undercharge cases brought by defunct carriers. *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101, 104-107 (1st Cir. 1990); *Advance United Expressways, Inc.* v. *Eastman Kodak*

[8] Likewise, the Commission has acknowledged its authority to decide the issue of the reasonableness of a rate when the matter is raised in defense to a court action. *Glama Dress Co.* v. *Mid-South Transp., Inc.*, 335 I.C.C. 586, 588-590 (1969) (Commission determined it had authority to decide rate-reasonableness issue when complainant had filed a counterclaim in pending court collection action raising issues of reasonableness and lawfulness of the rates).

Co., No. 91-1320 (5th Cir. June 26, 1992);[9] *Orr* v. *ICC*, 912 F.2d 119, 122 (6th Cir. 1990); *Atlantis Express, Inc.* v. *Standard Transp. Serv., Inc.*, 955 F.2d 529, 535-538 (8th Cir. 1992);[10] see *Duffy* v. *BMC Indus., Inc.*, 938 F.2d 353, 357 (2d Cir. 1991) (referring rate-unreasonableness defense to the ICC, and staying undercharge action, when the statute of limitations would preclude assertion by shipper of affirmative reparations claim); *Delta Traffic Serv., Inc.* v. *Georgia-Pacific Corp.*, 936 F.2d 64, 66 (2d Cir. 1991) (declining to refer unreasonableness defense when it was not raised in district court, but directing the lower court to stay proceedings pending ICC's determination of reparations claim).

Those decisions are consistent with this Court's long-standing exposition of the primary jurisdiction doctrine. They represent an appropriate way to permit the Commission to enforce the basic requirement of the Act that a carrier's tariff rates must be reasonable and that an

[9] In *Advance United*, the Fifth Circuit held that "shippers may assert rate unreasonableness as a defense in an action by a carrier for undercharges and that district courts should refer issues pertaining to rate unreasonableness in such cases to the [ICC]." Slip op. 1. The court explained that "the primary jurisdiction doctrine mandates that the defense of unreasonableness initially be committed, according to the usual procedures under 28 U.S.C. § 1336(b), to the ICC for its review and decision." *Id.* at 12. In light of *Maislin*, the court expressly disavowed its prior suggestion in *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 497 U.S. 1010 (1990), that the filed rate doctrine bars the stay of an undercharge action for referral of a rate-unreasonableness defense to the ICC. Slip op. 8-9. The court of appeals in the present case had expressly relied on the former approach of the Fifth Circuit reflected in the *Caravan* decision. Pet. App. 8a.

[10] In *Atlantis Express*, the Eighth Circuit held that referral is required when "the parties agreed to a negotiated rate and the shipper (or broker) no longer has an adequate reparations remedy [for rate unreasonableness] at the time it is billed for the undercharges." 955 F.2d at 536. The court reserved whether rate unreasonableness is generally available as a defense in other cases. *Ibid.*

unreasonable rate is "not enforceable." *Maislin*, 110 S. St. at 2767. Contrary to the concern voiced by the court of appeals in this case, Pet. App. 7a-8a, courts have not referred cases to the ICC when the claim of unreasonableness is not backed by an adequate preliminary showing.[11] Rather, the courts have ordered cases referred when necessary to protect the shippers' rights in the event that the ICC should determine that the carrier is seeking to collect an unreasonable or unlawful tariff rate.

B. The Filed Rate Doctrine Does Not Preclude Referral To The ICC Of A Rate-Unreasonableness Challenge

In refusing to refer the rate-unreasonableness defense to the ICC, the court of appeals invoked the filed rate doctrine. That doctrine, however, does not compel a court to enforce a tariff rate without a referral to the Commission for a prior determination of whether the rate is unreasonable. When the carrier will not be prejudiced by a stay, and when there is no adequate opportunity for the shipper to make its claim in later reparations proceedings, referral is fully compatible with the filed rate doctrine. Those are the circumstances here.

1. The filed rate doctrine requires carriers to collect, and shippers to pay, the rates contained in filed ICC tariffs. Under that doctrine, it is not a defense that the shipper was ignorant of the rate, that the carrier misquoted it, or that the parties agreed to a different rate. *Maislin*, 110 S. Ct. at 2766; *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922). The doctrine pro-

[11] See *Atlantis Express*, 955 F.2d at 537 ("to justify referral, parties must make a threshold showing that the ICC could find the filed rates unreasonable"); *Transtop, Inc.*, 902 F.2d at 106 (that negotiated rates were "significantly lower" than the filed rates raised a "sufficient possibility" that ICC might find the filed rates unreasonable to justify referral); cf. *Branch Motor Express Co.* v. *Caloric Corp.*, 914 F.2d 241 (3d Cir. 1990) (Table) (refusing to refer when the claim of unreasonableness was entirely unsupported).

motes stability, uniformity, and nondiscrimination in the rates governing regulated transportation services. But it has always been recognized that "[t]he filed rate doctrine * * * contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 110 S. Ct. at 2767, citing *Maxwell*, 237 U.S. at 97.[12] In *Maxwell*'s "classic statement" of the filed rate doctrine, *Maislin*, 110 S. Ct. at 2766, this Court declared that the filed rate applies "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. Similarly, Justice Brandeis observed for the Court in *Keogh* v. *Chicago & N.W. Ry.*, *supra*, that the tariff rate governs shippers' and carriers' rights "[u]nless and until suspended or set aside" by the ICC. 260 U.S. at 163.

That basic principle is directly implicated in this case. Petitioners have been sued for charges under a tariff whose rates are challenged as unreasonable. It is universally recognized that the ICC alone is empowered to adjudicate the reasonableness and lawfulness of those tariff charges. The claim that the rates are unreasonable, if valid, would foreclose enforcement of the tariff rate. *See Maislin*, 110 S. Ct. at 2767; *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 521 (1939). Because the filed rate doctrine is qualified by the statutory requirement of rate reasonableness, and because the ICC has exclusive power to address that issue, referral to the ICC is not barred by the filed rate doctrine.

[12] The Court in *Maislin* unanimously subscribed to that principle. See 110 S. Ct. at 2767 (opinion of the Court); *id.* at 2772 (Scalia, J., concurring) (acknowledging "an implicit but unexpressed exception to the filed-rate requirement" in order "to reconcile two textual provisions that would otherwise be categorically inconsistent (do not charge unreasonable rates, but charge whatever rates you have filed)"); *id.* at 2773 (Stevens, J., dissenting) ("From the beginning, * * * the Court construed that command [to charge filed rates] as subject to the unstated exception that a filed rate would not be enforced if the [ICC] determined that the rates were 'unreasonable.'").

The filed rate doctrine is not an independent legal construct, with applications that range beyond the provisions of the statute it implements. Rather, the doctrine exists to give meaning to the Act's specific requirements—particularly the provision that carriers may not charge or collect a rate that is not on file with the ICC. 49 U.S.C. 10761(a). No provision of the Act, however, prohibits a court from staying an undercharge action pending referral to the ICC of the issue of reasonableness.[13] To the contrary, in certain cases it would effectively abrogate the rate-reasonableness requirement of the Act to prohibit referral to the ICC. See *United States* v. *Western Pacific R.R.*, *supra*.

Nor would it serve the purposes of the filed rate doctrine to interpret it as a per se bar to referral. The fundamental goal of the filed rate doctrine is to prevent discrimination between shippers. Yet that goal is not impaired when it is the *Commission* that finds a rate to be unreasonable and therefore unenforceable. See *Texas & Pacific Ry.* v. *Abilene Cotton*, 204 U.S. at 441-442. Petitioners will ultimately have to pay whatever rates are found to be both applicable and reasonable by the ICC, which is the same requirement that applies to all other shippers that employed Carolina's transportation services.

The filed rate doctrine also serves the purpose of aiding a carrier in timely collection of its published charges; the rule thereby assists the carrier in maintaining financial solvency and contributes to a stable transportation system.

[13] For that reason, the issue in this case is quite distinct from the issue addressed in *Maislin*. In that case, this Court held that the filed rate doctrine prohibits an "unreasonable practice" defense based on the rate negotiated by the parties in view of the Court's conclusion that such a defense contradicted specific provisions of the statute 110 S. Ct. at 2767, citing 49 U.S.C. 10761, 10762, 10741, and 10701. It is indisputable, however, that the ICC can declare a rate to be unreasonable under its express statutory powers, see 49 U.S.C. 10701, and Congress has long recognized that courts may implement the primary jurisdiction doctrine by referring claims to the Commission. 28 U.S.C. 1336(b).

See *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. at 520-521. That purpose has relevance when the carrier continues to operate. But when a carrier is in bankruptcy and has ceased operations, immediate payment is not necessary to preserve its operating capital. There is no justification, therefore, for frustrating the ICC's enforcement of the reasonableness requirement of the Act.[14]

2. This Court's decisions do not require rigid adherence to a requirement that shippers must pay the tariff rate first, and then seek reparations for the tariff's unreasonableness in a separate proceeding. Contrary to respondents' contention (Br. in Opp. 10, 13-14), this Court's rulings in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932), and *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913), did not involve the issue of whether referral to the ICC of an unreasonableness defense is compatible with the filed rate doctrine. Moreover, the decision in *Crancer* v. *Lowden*, 315 U.S. 631, 635-636 (1942), supports, rather than undercuts, the existence of discretion in the district court to order such referrals.

In *Arizona Grocery*, the issue was whether the Commission could "award reparations with respect to shipments which moved under rates approved or prescribed by it." 284 U.S. at 381. In the course of holding that the Commission could not do so, the Court stated that "the legal [tariff] rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. * * *

[14] The court of appeals also based its holding on a concern that if shippers could obtain automatic referral, they would routinely raise reasonableness defenses in order to delay payment of the filed rate. That concern has not materialized, see note 11, *supra*, and there is no reason to doubt that district courts will weed out insubstantial or pretextual claims. In any event, the possibility of some improper claims does not outweigh the certainty that absent referral, shippers that have been charged unreasonable or otherwise unlawful rates will be denied a meaningful remedy. See p. 22, *infra*.

[T]he shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation." 284 U.S. at 384. The essential point of that statement is that the *Commission* has exclusive power to determine the reasonableness of the rate; "only the enforcement of the award [is] relegated to the courts." *Id.* at 385. The Court did not comprehensively describe the procedural steps a shipper could take to challenge a rate as unreasonable when sued for undercharges.

Respondents' reliance on *Pennsylvania R.R.* v. *International Coal Mining Co.*, *supra*, is also misplaced. There, the issue was whether the shipper could recover damages after paying the tariff rate when the carrier had granted discriminatory rebates to other shippers. The Court rejected that assertion. It also rejected the claim that the carrier could unilaterally conclude that its rates were too high and grant rebates, stating: "If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation." 230 U.S. at 197. That a carrier may not declare its own tariffs unreasonable and grant rebates does not imply that a court is precluded from referring to the ICC the issue of whether a tariff rate is reasonable when that issue arises in litigation.[15]

---

[15] The statements in this Court's cases indicating that the shipper must pay first and seek reparations later must be understood in light of the background principle that disputes over the reasonableness of rates may not be used as a means of obtaining delivery without payment. See 49 U.S.C. 10743(a) (except as provided by the ICC, a carrier "shall give up possession at destination of property transported by it only when payment for the transportation or service is provided"); *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 653 (1913) ("The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried * * * until the full legal rate has been paid."). Credit was not generally offered. See *Ex Parte No. 73: Rules and Regulations for Prompt Payment of Transportation Rates and Charges Prescribed*, 57 I.C.C. 591, 593, 596 (1920) ("'The majority of shippers or consignees in the past have paid their freight when they received their goods and that practice should be continued for the future.' * * * The rules and regulations which we promulgate should contemplate the collection of transportation charges prior to, or contemporaneous with, the delivery of most shipments.") (quoting United States Railroad Admin., Circular No. 9 (June 29, 1918)).

The Court's analysis in *Crancer* v. *Lowden*, *supra*, suggests that referral *is* permissible. There, the carrier sued to recover freight charges based on a tariff rate. The shipper claimed that a lower tariff rate applied, and that, if the higher tariff were applicable, it should be found unreasonable. This Court held that, in view of the ICC's finding in a prior case that the lower tariff did not apply to similar shipments, the district court correctly rejected the shipper's claim that the lower tariff was applicable. The Court also held that the district court did not abuse its discretion in refusing to stay its proceedings pending a second ICC proceeding where the shippers contended that, as applied to them, the tariff rate was unreasonable. 315 U.S. at 633, 635-636. The Court explained that:

> If the trial judge had, in the exercise of his discretion, continued the trial of the cause until such time as the Commission had passed upon the reasonableness of the rate, the delay might have made it impossible for the carrier to produce the witnesses who had made the inspection of the shipments. On the other hand, the petitioners suffered no hardship as a result of the trial court's insistence on proceeding with the trial. If petitioners pay the judgment in this case, and the Commission should, in the still pending proceeding, decide to modify the tariffs, petitioners can obtain a complete remedy by way of reparation. * * * We hold that under the circumstances there was no abuse of discretion by the trial judge.

Id. at 636. *Crancer* does not state that the filed rate doctrine poses a rigid bar to a stay and referral; to the contrary, the Court ruled that there was "no abuse of

discretion" in the district court's determination to proceed in light of the balance of hardships faced by the parties in the circumstances of that case. The same approach, in the present context, strongly indicates that referral is the appropriate way to reconcile the parties' interests.

The bankrupt carriers and their collection agents do not face a risk of prejudice from referral to the ICC. Unlike in *Crancer*, there is no risk that delay might harm the carrier's ability to establish the claim; there is no dispute about the facts in the typical undercharge case filed by a bankrupt motor carrier's trustee. Here, for example, the relevant facts turn on the difference between the rates paid and the rates in the tariffs on file; those facts are undisputed. Pet. App. 28a, 60a.

On the other side of the ledger, the shippers sued by such carriers lack a "complete remedy" in reparations. *Crancer*, 315 U.S. at 636. Because the motor carrier is insolvent, it is unable to satisfy any subsequent reparations order. See *Delta Traffic Serv., Inc.* v. *Georgia-Pacific Corp.*, 936 F.2d at 66 ("[a] reparation order would be of little comfort to [the shipper], however, if [the carrier] was not in a position to comply with the order, and [the carrier's] status as a Chapter 11 debtor raises questions in this regard"); *Atlantis Express*, 955 F.2d at 537 ("Because [the shipper] was not billed for the undercharges until after [the carrier], a corporation, had liquidated, [the shipper] would have no remedy if it were unable to raise an unreasonableness defense."). In those circumstances, enforcement of the filed tariff without referral to the ICC would nullify the reasonableness requirement of the statute: it would undermine the ICC's exercise of its unreasonable-rate jurisdiction, recognized by this Court in *Maislin*, and deny the shipper an adequate remedy. Nothing in this Court's filed rate decisions compels that result.[16]

[16] *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), lends no support to the court of appeals' holding. In that case, the Court held that it was not permissible for a court to refer to the ICC the shipper's claim that a tariff rate was unreasonable, because the Act at that time provided no authority for the ICC to award reparations based on unreasonableness of past motor carrier rates. As Justice Stevens noted in his dissent in *Maislin*, the precedential value of *T.I.M.E.* was undercut by this Court's decision in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), and "what remained of it was soon thereafter unambiguously repudiated by Congress." 110 S. Ct. at 2776 n.12, citing Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 (codified at 49 U.S.C. 11705(b)(3), 11706(c)(2)) (creating express reparations remedy). "[W]hen Congress amended the [Act] to create such [a reparations] action, the basis for the *T.I.M.E.* holding was no longer valid." *Atlantis Express*, 955 F.2d at 537 n.15; *Transtop, Inc.*, 902 F.2d at 106 (same). Nor do *Mohasco Indus., Inc.* v. *Acme Fast Freight, Inc.*, 491 F.2d 1082, 1084 (5th Cir.), cert. denied, 419 U.S. 842 (1974), and *United States* v. *Associated Transp., Inc.*, 505 F.2d 366 (D.C. Cir. 1974), hold that the statute as amended bars referrals in the present context. Those cases merely distinguished between the administrative reparations remedy enacted to overrule the *T.I.M.E.* decision and the judge-made remedy of common law restitution. They have no relevance to the question here, which goes to the *timing* of the administrative remedy available to a shipper assessed with an unreasonable tariff rate.

3. The proper approach is to structure judicial review to achieve the purposes of the Act implicated by the particular collection proceeding. This Court has emphasized that judicial review of ICC determinations should be carried out in a fashion that preserves the ICC's primary jurisdiction over rates and protects parties unable to benefit from later reparation proceedings. *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982). In that case, the court of appeals, after vacating the last two of three successive ICC orders, concluded that its decision effectively "revived" the rate level established by the Commission's first order, and it required the carrier to collect that rate. This Court reversed, holding that the court's action had the impermissible effect of fixing a transportation rate. That action, the Court explained, undermined the ICC's "primary jurisdiction" to determine the reasonableness of rates and, moreover, failed to leave car-

riers "adequately protected" because the railroads could not seek reparations to recover losses if the rates the court established fell short of those ultimately found reasonable. *Ibid.*

Similarly, when the carrier is insolvent, a federal court order requiring immediate payment of the filed rate thwarts the Commission's ability to exercise its primary jurisdiction over rates and leaves shippers without a realistic opportunity for relief. That result is not required by the Act, and cannot be justified as an appropriate exercise of judicial discretion. It is the ICC that has "discretion to craft appropriate remedies for violations of the statute." *Maislin*, 110 S. Ct. at 2769; *ICC* v. *American Trucking Ass'ns, Inc.*, 467 U.S. 354, 364-365 (1984); *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 352 (1982). In the present category of cases, the Commission has determined that the proper remedy for unreasonableness violations is not to relegate the shipper to reparations proceedings, but to establish whether the rate is unreasonable *before* the bankrupt carrier collects it. See pp. 5-6, *supra*. By refusing to refer the issue of reasonableness to the ICC prior to collection of the filed rate, courts prevent the Commission from implementing its preferred remedial approach.

The court of appeals expressed the view that enforcement of the filed rate without referral to the ICC would merely place the shipper on the same plane as other shippers who had paid the full tariff rate in the first instance; that is, the shippers could seek reparations and then make a claim against the bankruptcy estate. Pet. App. 10a n.4. Neither the filed rate doctrine nor this Court's cases support that analysis.[17] A shipper's right to be free from unreasonable charges under a tariff does

[17] Nor do commercial practices in the motor carrier industry. In the highly competitive market that has prevailed in the last decade, shippers have not relied on reparations proceedings to contest tariffs thought to be too high; they have simply sought better rates from another carrier. As a result, rate-reasonableness cases are reaching the Commission today only in the context of undercharge claims by insolvent (or otherwise defunct) motor carriers.

not depend on whether (or how) other shippers have claimed that right.

Nor are the bankrupt carriers and their creditors entitled to the benefit of an illegal exaction under a tariff. If respondents had brought collection actions against other tradespersons not subject to ICC regulation, those defendants could plainly raise defenses such as illegality of the claim; it would be fundamentally unfair to allow prosecution of the claim, but to bar assertion of the defense. That equitable principle applies with even greater force here. Respondents' claim for recovery rests solely on the filed rate requirement of the Interstate Commerce Act. Respondents should not be allowed to invoke one provision of the Act while frustrating application of another—thus subordinating the requirement that rates must be reasonable and otherwise lawful to their creditors' interest in obtaining funds.

C. The Claim Of Rate Unreasonableness In This Case, If Appropriately Supported, Should Be Referred To The Commission

The court of appeals held that it was precluded by the filed rate doctrine from referring the claim of rate-unreasonableness to the Commission. That holding is erroneous. When the party seeking to enforce the filed rate is in bankruptcy, there is little, if any, prospect that a shipper that prevails in an unreasonableness claim could be made whole through reparations proceedings. In that context, nothing in the Act forecloses the court from staying its proceedings and referring the issue of reasonableness to the ICC. Indeed, when the carrier's trustee brings suit more than two years after the traffic moved, thus foreclosing the shipper's resort to reparations proceedings by virtue of the running of the statute of limitations, it is also the case that reparations are inadequate, and referral to the ICC is appropriate. 49 U.S.C. 11706(c)(2) (two-year statute of limitations governing shipper's reparations remedy); *United States* v. *Western Pacific R.R.*, 352 U.S. at 70-74 (referral required when collection action commenced following running of statute of

limitations on reparations claim); *Duffy* v. *BMC Indus., Inc.*, 938 F.2d at 357 (same); see Pet. App. 94a, 97a (some CCE shipments involved in this case moved in December 1983); J.A. 14-18 (complaint against CCE filed December 18, 1986).

The remaining issue is whether petitioners made an appropriate threshold showing that the tariff rates are unreasonable, thus warranting a referral of the issue to the Commission. A substantial difference between the negotiated rates billed and the tariff rates, or between the tariff rates and the rates available from other carriers, is prima facie evidence that the tariff rates are unreasonable. Similarly, a tariff rate under which the traffic would not have moved is prima facie unreasonable. See note 5, *supra* (summarizing factors traditionally considered by the Commission in evaluating unreasonableness claims). Because the courts below, however, have not considered whether petitioners made a sufficient preliminary showing, the case should be remanded for further proceedings on that issue.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER C. REITER and CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC., MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., THE INTERNATIONAL MASS RETAIL ASSOCIATION, THE RUBBER MANUFACTURERS ASSOCIATION, THE TRANSPORTATION BROKERS CONFERENCE OF AMERICA, AND THE TRANSPORTATION CLAIMS AND PREVENTION COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether, in an action by an insolvent carrier to collect a filed rate which is more than the rate the carrier charged and collected, the trial court should stay its proceedings and refer to the Interstate Commerce Commission the question whether the filed rate was "reasonable" within the meaning of the Interstate Commerce Act, 49 U.S.C. § 10701(a).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1496

PETER C. REITER and CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC., MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., THE INTERNATIONAL MASS RETAIL ASSOCIATION, THE RUBBER MANUFACTURERS ASSOCIATION, THE TRANSPORTATION BROKERS CONFERENCE OF AMERICA, AND THE TRANSPORTATION CLAIMS AND PREVENTION COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici curiae are seven national organizations of shippers and transportation brokers.[1] The issue presented by the holding below is of great importance to the thousands of shippers of all sizes and to the hundreds of

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[1] *See* Appendix for a brief description of each *amicus*.

transportation brokers represented by *amici* who have been sued, or who may be sued, by carriers seeking to collect transportation rates substantially higher than the charges that were fairly negotiated and paid for years ago. Because of the importance of this problem to *amici*, they wish to present their views to assist the Court properly to resolve the issue presented.[2]

STATEMENT

Amici adopt the statement of the case presented in the opinion of the court of appeals (Pet. App. 2a-5a), but offer the following description of the regulatory and business environments out of which this case arises to assist the Court in evaluating the legal issue presented.

1. *Regulatory Environment.* From 1935, when the Interstate Commerce Act ("ICA") was amended to cover motor carriers, until 1980, the motor carrier industry, like the railroad industry, was closely regulated. The Interstate Commerce Commission strictly regulated entry into the industry, the growth of carrier firms, the routes carriers serviced and the cargo they moved. Most critically, the ICC regulated rates, which were set primarily through collective action by carrier rate bureaus, to ensure that they were "reasonable" and "nondiscriminatory" within the meaning of the ICA, 49 U.S.C. § 10701(a). See generally, *Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures* (*"Ratemaking and Related Practices"*), 7 I.C.C.2d 388, 393 (1991).

Twelve years ago, in an effort to promote competition in the transportation sector, Congress amended the ICA by enacting the Motor Carrier Act of 1980. See Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified at scattered sections of 49 U.S.C.). These amendments partially deregulated the carrier industry. Among other changes, Congress substantially relaxed the

[2] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing ~~of this~~ brief. The parties' letters of consent will be filed with the Clerk of the Court.

rules governing entry into the carrier market, 49 U.S.C. § 10922(b), dropped certain route and cargo restrictions, *id.* at § 10922(h), and limited collective ratemaking, *id.* at § 10706(b). Congress also restricted the Commission's authority to investigate and suspend on its own initiative proposed rate changes that fell within statutorily defined "zones of ratemaking freedom." *Id.* at § 10708(d).[3]

While modifying the industry's regulatory structure substantially, Congress in 1980 declined to deregulate the industry entirely. Most significantly, it retained the bedrock requirements of the ICA that common carriers must charge "reasonable" rates, 49 U.S.C. § 10701(a), and that common carriers must file all rates with the ICC, *id.* at § 10761(a). In addition, Congress did not interfere with the ICC's broad authority to determine rate reasonableness, 49 U.S.C. § 10701(a), nor with shippers' statutory right to hold carriers liable for damages resulting from the imposition of rates that the ICC finds to be unreasonable, 49 U.S.C. §§ 11705(b)(3), 11706(c)(2).

2. *Business Environment.* Following the adoption of the Motor Carrier Act, a substantial number of new carriers entered the transportation marketplace. Indeed,

[3] Before 1979, the Commission reviewed all tariff filings prior to the time they became effective. Since that date, the Commission has reviewed only a random sampling of filed tariffs. *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 360 n.4 (1984). Accordingly, the Commission can no longer assume that filed tariffs are reasonable.

In addition to the other changes, Congress substantially relaxed the rules governing "contract" carriage, principally by permitting carriers simultaneously to act as both common and contract carriers. "Contract" carriers—like most other merchants—are permitted to enter into entirely private contractual arrangements with shippers. In 1983 the ICC, pursuant to authority delegated to it by Congress, exempted contract carriers from the requirement that they file rates. *See Exemption of Contract Carriers From Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd sub nom. Central & S. Motor Freight Tariff Ass'n* v. *United States*, 757 F.2d 301, 314 (D.C. Cir. 1985). By 1991, approximately 75% of all common carriers were authorized to offer contract carriage. ICC Office of Economics, *The U.S. Motor Carrier Industry Long After Deregulation* 72 (1992).

the number of carriers regulated by the ICC more than doubled between 1980 and 1991, increasing from less than 20,000 to nearly 48,000. ICC Office of Economics, *The U.S. Motor Carrier Industry Long After Deregulation* ("*Long After Deregulation*") 72 (1992).

Notwithstanding this increased competition, most carriers, acting collectively through rate bureaus, have continued to file general rate *increases* on at least an annual basis since 1980, *Ratemaking and Related Practices*, 7 I.C.C.2d at 489-97, and thus tariff class rates have increased substantially since that time. This paradoxical practice makes economic sense only in light of the carriers' practice of discounting their rates to attract business. Because of competition within the industry, most carriers, fully aware that the class rates will not move any traffic, charge rates substantially below the class rates. *Id.* at 410-20.[4] Overall, in 1990 the average discount off the class rates was approximately 40%, *id.* at 450, and in those sectors of the industry where competition is most intense, price discounts range as high as 78%, *id.* at 413. Many carriers also offer discounts in the form of service benefits. *Id.* at 418.

The ICC has held that different discounts from class rates for individual customers are not per se discriminatory. *Regular Common Carrier Conference-Petition For Declaratory Order-Range Of Discount And Customer Account Codes*, 8 I.C.C.2d 47 (1991). Indeed, in recent years the Commission has taken steps to foster discounting and competitive pricing, for example, by permitting individual filed rates to take effect within 24 hours. See *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146,

[4] By filing for higher class rates and simultaneously offering discounts off those rates, carriers were able progressively to increase their rates while representing to their customers that they are receiving discounted rates. For example, one typical regional rate bureau filed rate class increases totaling 45% between 1985 and 1991, and average discounts increased by 23% during this period. *Ratemaking and Related Practices*, 7 I.C.C.2d at 489 (Addendum E).

150-52 (1984). Despite this lenient rule, many carriers —including respondent Carolina Motor Express ("CME") and plaintiffs in similar undercharge actions—misfiled or failed to file with the Commission many of the discount rates they negotiated with shippers.

The heightened competition among carriers has made the industry substantially more efficient. The ICC's Office of Economics reports that competition has led to improved service and reliability and, most important, lower transportation costs. See *Long After Deregulation* at 6. Substantial evidence suggests that lower transportation costs have been passed on to consumers in the form of lower product prices. *Id.* at 9-13. And overall, the Department of Transportation has estimated that the competitive changes in this industry have saved the U.S. economy more than $10 billion annually since 1980. *Id.* at 6.

3. *The Nature of the Problem.* As is almost invariably true after deregulation, more efficient carriers have grown in the post-Motor Carrier Act environment. Many other carriers, however, including respondent CME, were unable to survive and have filed for bankruptcy. Rate auditors retained by the bankruptcy trustees for these companies, upon learning of the discrepancies between the filed rates and the rates actually billed and accepted by these insolvent carriers, have sought to collect the differences between the filed rates and the actual charges from the carriers' former customers. The auditors' efforts have taken the form of "dunning" letters, which demand payment of the higher tariff rates for services rendered years ago, and which are followed closely by suits alleging undercharges. See generally McGinley & Machalaba, *Fight Over Freight: Failed Trucking Firms Are Trying to Recoup Discounts They Gave*, Wall St. J., June 16, 1992, at A1; Phillips, *Law Lets Trucking Firms Raise Rates Retroactively*, Washington Post, June 16, 1992, at C1, C6.

In many instances, *i.e.*, where tariffs contain a set of class rates and various discounts based on the type and volume of traffic, even the applicable rate under the

tariff cannot be ascertained readily. In that situation, "[a] rebilling [by the trustee] is a unilateral declaration by the [trustee] that the rate originally charged for the shipment was unlawfully applied, and that a higher rate (most frequently the highest rate on file) should have been applied." ICC Ex parte No. MC-208, *Nonoperating Motor Carriers—Collection of Undercharges* ("*Nonoperating Motor Carriers*"), slip op. at 2 (June 1, 1992).

The magnitude of this "rebilling" practice is extraordinary. The ICC estimates that hundreds of thousands of shippers have been targeted by bankruptcy trustees and their auditors. *Id.* These targets run the gamut from large shippers—many of whom have been dunned for millions of dollars—to small companies—some of whom allegedly owe no more than several hundred dollars. *Id.* In one case alone, now-defunct Transcon Lines of Los Angeles has sued approximately 350,000 former customers seeking hundreds of millions of dollars in "undercharge" payments. McGinley & Machalaba, *supra*, at 1.

The financial stakes in this "rebilling" practice are therefore staggering. Some shippers, particularly small companies, may themselves be forced into bankruptcy if they are required to pay the full tariff rates. *Id.* Overall, the ICC estimates that shippers may be exposed to claims for as much as $27 billion, plus another $5 billion in prejudgment interest. *Nonoperating Motor Carriers* at 2.

SUMMARY OF ARGUMENT

In *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), this Court held that the ICC could not generally prohibit an insolvent carrier from attempting to collect a filed rate after it had negotiated a lower rate with a shipper but failed to file that rate with the ICC. The Court indicated, however, that a shipper could defend against such an effort on the ground that the filed rate was statutorily "unreasonable," and indicated that the district court should consider that issue on remand. *Id.* at 2767 & n.10.

The Court did not, however, decide the precise issue raised by this case: whether the trial court adjudicating such a dispute should stay its proceedings and refer the issue of reasonableness to the ICC, or whether the court should require the shipper to pay the filed rate and then seek to recover the difference in a separate, sequential civil action in which the reasonableness issue would be referred to the ICC. In *amici's* view, the former course is plainly required by the ICA and the doctrine of primary jurisdiction, by the holdings of this Court, and by sound public policy considerations that are embodied in the Act. Moreover, no rule of bankruptcy law requires a different result.

A.

1. The ICA, in its central provision, requires that motor common carriers must charge "reasonable" rates. 49 U.S.C. § 10701(a). The ICA also requires such carriers to file rates in public tariffs with the ICC and to charge and collect only the filed rates. *Id.* at § 10762(a). These two provisions are integrally related: Because a filed rate is not "lawful" if it is not "reasonable," *Arizona Grocery Co.* v. *Atchison, T. & S. F. R.R.*, 284 U.S. 370, 384 (1932), "the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 110 S. Ct. at 2767. Accordingly, a shipper must be entitled to defend against a claim by a carrier for money in excess of the amount charged and accepted on the ground that the filed rate is unreasonable.

2. The argument that shippers are entitled to raise rate reasonableness as a defense in undercharge actions is independently supported by the "primary jurisdiction" doctrine. Under the terms of this doctrine, the ICC is vested with authority to determine whether filed rates are "reasonable" when that issue is properly raised. In addition, this doctrine "transfers from court to agency" law-making power with respect to rates. *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 65 (1956). Accordingly, this doctrine prohibits the courts from usurping the ICC's authority over rates by depriving the Commission of a

meaningful opportunity to exercise its authority—*i.e.*, an opportunity to exercise its authority at a time when it will have a practical effect. In this case, an ICC determination that the filed rates were not "reasonable" would have no practical effect if rendered after petitioners have paid the filed rate because respondent CME is insolvent.

B.

Immediate referral to the ICC is also required by this Court's decisions construing the ICA. This Court has made plain that carriers have no legal right to collect rates that are unreasonable. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960). Accordingly, where carriers sue for undercharges, they should not automatically be entitled to collect the filed rate. Instead, shippers should be permitted to raise the unreasonableness of the filed rates as a *defense*, and the issue should be referred to the ICC.

While this outcome appears to follow inexorably from the language of the statute and the primary jurisdiction doctrine, this Court has suggested, without holding, that under some limited circumstances the shipper should pay first and collect later. *See Arizona Grocery*, 284 U.S. at 384; *Pennsylvania R.R.* v. *International Coal*, 230 U.S. 184, 197 (1913). More than 35 years ago, however, in *Western Pacific*, *supra*, this Court made clear that where a shipper does *not* have complete assurance of being made whole after a separate reparations action before the ICC, the question of reasonableness *must* be referred to the ICC at the outset. Because respondent CME is insolvent, petitioners will not be made whole after a separate reparations action. Thus, *Western Pacific* requires the district court to stay respondents' undercharge action and refer the question of whether the filed rates were "reasonable" to the ICC.

Referral in this case is also supported by this Court's decision in *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 367 (1984), in which this Court held that the ICC has discretionary power to fashion a remedy beyond its express authority if the remedy directly and closely furthers a specific statutory mandate. In this case, the ICC has determined that shippers must have an opportunity to challenge the reasonableness of rates at a time when a determination by the Commission will have some practical import. This remedy clearly furthers a statutory mandate—indeed, the *core* statutory mandate of rate reasonableness—and is unquestionably directly and closely tied to that mandate.

C.

The rule requiring direct referral to the ICC is also supported by considerations of public policy embodied in the ICA, particularly the policy favoring rate reasonableness. In contrast, the pay-first requirement adopted by the court of appeals elevates the filed rate requirement to an unwarranted position of superiority over the reasonableness requirement. Indeed, by ignoring the fact that a judgment favoring a shipper in a reparations action would, as a practical matter, be unenforceable, the holding below entirely guts the statutory requirements that rates must be "reasonable."

Moreover, the pay-first requirement would create a perverse incentive for carriers *not* to file rates. Under this requirement, if a carrier fails to file its rates, it can, as in this case, seek higher rates in a subsequent action. If it loses, it is no worse off than if it had filed in the first place; if it wins—or if it induces shippers to settle—it can receive rates far higher than those at which it otherwise could have transported the goods.

D.

No specific provision of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, governs this case. Nevertheless, contrary to the suggestion of the court of appeals, the Bankruptcy Code fully supports the rule that an unreasonableness defense must be adjudicated in the same proceeding as an undercharge claim. First, it is axiomatic that the bankruptcy laws must not be interpreted to permit "creat[ion of] a windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961). In this case, respondent CME will

obtain precisely the sort of "windfall" that the Code forbids if the pay-first procedure is followed because it will never be required to repay the difference between the filed rate and the negotiated rate if the ICC finds the filed rate to be unreasonable.

Second, under the Code and common law principles of bankruptcy pre-dating the Code, even an entity that is both a debtor and a creditor of the bankruptcy estate is not required to pay first and collect later. 11 U.S.C. § 553. Such an entity is, instead, entitled to set off the debt it owes against the debt it is owed or to recoup any amount it is owed. By parity of reasoning, petitioners should be permitted to have the reasonableness of the filed rates determined before they must pay any additional monies to respondents.

ARGUMENT

The requirement that the rates carriers charge for shipping goods must be "reasonable" is the cornerstone of the Interstate Commerce Act. At bottom, this case raises the question of whether, in some circumstances, this core requirement can be circumvented.

Two years ago, in *Maislin Indus., U.S., Inc.* v. *Primary Steel Inc.*, 110 S. Ct. 2759 (1990), this Court held that the ICA's prohibition against "unreasonable practices" could not generally be applied to bar a bankrupt carrier from attempting to collect a filed rate after it had negotiated a lower rate with a shipper but failed to file that rate with the ICC. This Court held that the ICC's policy prohibiting this practice "directly conflict[ed]" with the filed rate requirement of the ICA, which requires, *inter alia*, that carriers both charge and receive the filed rate. *Id.* at 2770.

While rejecting the ICC's contention that a carrier's attempt to collect a filed rate after it had negotiated a lower rate constituted a statutorily prohibited "unreasonable practice," this Court reaffirmed the central role of the ICC as regulator of the motor carrier industry. The Court made clear that, despite generalized Congressional

"exhortations" in the Motor Carrier Act of 1980 to the contrary, the motor carrier industry remained a regulated industry in which rates must be filed, *id.* at 2770, and that the ICC retained the power and exclusive responsibility to determine the reasonableness of those rates, *id.* at 2767.

In so holding, the Court emphasized, as it has on many other occasions, that filed rates are not *lawful* rates if they are not "reasonable." 110 S. Ct. at 2767. Thus, the Court indicated that a shipper could defeat a carrier's efforts to collect a filed rate if the ICC determined that rate to be "unreasonable" within the meaning of 49 U.S.C. § 10701(a). *Id.* Accordingly, the Court held that "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand." *Id.* at 2767 n.10.

Although the Court suggested that immediate referral to the ICC was appropriate, the Court did not directly decide the question presented by this case: whether a shipper may defend against a claim for additional payment on the ground that the filed rate was unreasonable and have the merits of that defense referred to the ICC, or whether the shipper must pay the tariff rate and then seek to recover the difference in a separate, sequential civil action. As *amici* demonstrate below, the former course is plainly required by the ICA and its doctrine of primary jurisdiction, by the holdings of this Court, and by sound principles of policy embodied in the purposes of the ICA.

I. IN AN UNDERCHARGE ACTION BY AN INSOLVENT CARRIER, A COURT MUST REFER THE QUESTION WHETHER THE FILED RATE WAS REASONABLE TO THE ICC PRIOR TO ENTERING JUDGMENT AGAINST THE SHIPPER.

A. Both The Interstate Commerce Act And The Doctrine Of Primary Jurisdiction Require That Shippers Be Permitted To Raise The Defense That The Filed Rates Are Unreasonable In An Action By A Carrier To Collect Additional Fees, Particularly If The Carrier Is Insolvent.

The central requirement of the ICA is that shipping rates must be "reasonable." The primary jurisdiction doc-

trine vests principal law-making authority with respect to rates in the ICC. Properly analyzed, both the ICA's reasonableness requirement and the primary jurisdiction doctrine require that shippers be afforded an opportunity to raise the reasonableness of the filed rates as a defense in an action by a carrier to collect additional fees, particularly in those cases in which the prosecuting carrier is insolvent.

1. The ICA imposes a requirement on motor common carriers that they charge "reasonable" rates. Specifically, Section 10701 provides that "[a] rate . . . related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable." 49 U.S.C. § 10701(a). This provision codifies the longstanding common-law duty of carriers to charge no more than a "reasonable" rate. See *Arizona Grocery*, 284 U.S. at 384.

The ICA also requires motor common carriers to file rates in public tariffs with the ICC and to charge and collect only the filed rates. Specifically, Section 10761 of the Act provides, in pertinent part:

> [e]xcept as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff . . . .

49 U.S.C. § 10761(a). This requirement was designed principally to prevent *carriers* from engaging in unlawful rate discrimination—*i.e.*, favoring some shippers over others—by granting unpublished rebates or other preferences. *Maislin*, 110 S. Ct. at 2766; *Southern Pac. Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 344 (1982); *New York, N.H. & H. R.R.* v. *ICC*, 200 U.S. 361, 391 (1906). This requirement also helps carriers maintain a steady and predictable cash flow; so long as carriers file their rates and insist upon receiving those rates at the

time of shipment, they can be assured of receiving the filed rates for their services. *Louden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 521 (1939).

The Court has long recognized that the ICA's requirements that rates must be "reasonable" and that carriers must charge (and shippers pay) filed rates are complementary *affirmative* obligations of the statute. In the classic description of the relationship between these provisions, this Court stated that "[s]hippers . . . as well as carrier[s] must abide by [the filed rate], *unless it is found by the Commission to be unreasonable.*" *Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915) (emphasis added).

Most recently, in describing the relationship between these two statutory requirements, the Court in *Maislin* expressly recognized that a shipper's claim in an undercharge action that the filed rates were not "reasonable" is not simply an equitable defense of the type that this Court has long prohibited in undercharge actions.[5] The requirement that a shipper should pay no more than a "reasonable" rate is, rather, a matter of such fundamental importance under the statutory scheme that the filed rate requirement must be applied to accommodate it.

Indeed, the Court in *Maislin* stated unequivocally that "the filed rate *is not enforceable* if the ICC finds the rate to be unreasonable." 110 S. Ct. at 2767 (emphasis added). Citing a distinction it first drew in *Arizona Grocery*, the Court explained that an unreasonable rate is unenforceable because, "although the filed rate is the *legal* rate, . . . 'the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable.'" *Id.* (quoting *Arizona Grocery*, 284 U.S. at 384). The Court further explained that the "filed rate doctrine," properly under-

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[5] *See, e.g., Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915) ("*Ignorance or misquotation* of rates is not an excuse for paying or charging either less or more than the rate filed") (emphasis added); *Texas & Pac. Ry.* v. *Mugg*, 202 U.S. 242, 245 (1906) (*ignorance* of filed rate no defense) (emphasis added).

stood, is not concerned exclusively with filed rates, but rather "follows from the requirement that only filed rates be collected, . . . the requirement that rates not be discriminatory, . . . *and the requirement of § 10701 that carriers adopt reasonable rates* . . . ." *Id.* at 2767 (emphasis added). See also *id.* at 2772 (Scalia, J., concurring) ("§§ 10701(a) [the reasonableness requirement] and 10761(a) [the filed rate requirement] *need* to be reconciled by assuming an implicit but unexpressed exception to the filed-rate requirement") (emphasis in original); *id.* at 2773 (Stevens, J., dissenting) ("[f]rom the beginning . . . the Court construed [the] command [of § 10761(a)] as subject to the unstated exception that a filed rate would not be enforced if the Interstate Commerce Commission . . . determined that the rates were 'unreasonable' ").

In short, this Court has made clear that a shipper's claim in an undercharge action that the filed rates are not "reasonable" is not a prohibited "equitable" defense; instead, the reasonableness requirement is an "exception" to the filed rate requirement; and, most critically, the filed rate is lawful only if it is "reasonable." Accordingly, where, as here, a shipper is sued for the filed rate by a carrier that has billed, collected, and been satisfied by a lower rate, it follows that the shipper must be entitled, under the terms of the ICA itself, to defend against the carrier's claim for additional money on the ground that the filed rate was not "reasonable."[6] And, under the terms of the primary jurisdiction doctrine, see *infra* pp. 14-17, the question whether the filed rates are "reasonable" must be referred to the ICC.

2. Under the ICA, primary jurisdiction to determine whether filed rates are "reasonable" within the meaning

[6] Under the ICA, a shipper may not insist upon delivery without paying for the carrier's services. 49 U.S.C. § 10743(a). Thus, this case, like all undercharge cases, involves shippers that paid the rate billed; it does not involve a shipper seeking to ship goods but avoid payment on the ground that the rate quoted by the carrier is "unreasonable."

of the statute is vested in the ICC.[7] This jurisdiction was historically justified on the ground that the Commission must determine rates to further the statutory goal of uniformity and to prevent other abuses by carriers. See *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907). It is now recognized that the ICC must have primary jurisdiction to determine rates because it possesses certain "expert and specialized knowledge." *Western Pacific*, 352 U.S. at 64. The Commission is "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to determine the reasonableness of rates. *Far East Conference* v. *United States*, 342 U.S. 570, 575 (1952).[8]

Because primary jurisdiction to determine rates is vested in the ICC, the question whether the filed rates are reasonable must be referred to the ICC when the rate reasonableness defense is properly raised by a shipper in an undercharge action. As this Court has explained, "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, [the primary jurisdiction doctrine requires that] agencies created by Congress for regulating the subject matter *should not be passed over.*" *Id.* at 574 (emphasis added).

The primary jurisdiction doctrine, however, does not simply dictate that the ICC, rather than the courts, must determine whether rates are reasonable when that issue

[7] The ICA "altered the common law by lodging in the Commission [this] power [which was] theretofore exercised by the courts. . . ." *Arizona Grocery Co.* v. *Atchison, T. & S.F. R.R.*, 284 U.S. 370, 384 (1932); *also Burlington N., Inc.* v. *United States*, 459 U.S. 131, 141 (1982).

[8] Such a determination "is reached ordinarily upon voluminous and conflicting evidence, . . . [and an] adequate appreciation of . . . many intricate facts of transportation is indispensable." *Great N. Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). Moreover, the standards under which the ICC determines "reasonableness" are highly technical. *See, e.g.*, 49 U.S.C. §§ 10704(b)(2)(A), 10704(b)(3); *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 74 (1991).

is properly raised. In fact, this doctrine provides independent support for the more basic proposition that shippers must be permitted to raise the rate reasonableness defense in undercharge actions, particularly where the carrier is insolvent.

This doctrine, according to this Court, "does 'more than prescribe the mere procedural time table of the lawsuit. It allocat[es] the law-making power over certain aspects' of commercial relations. 'It transfers from court to agency the power to determine' some of the incidents of such relations." *Western Pacific*, 352 U.S. at 65 (citing Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. Pa. L. Rev. 577, 583-84 (1954)). More specifically, in the motor carrier context, this doctrine transfers from the courts to the ICC principal law-making authority with respect to rates.

Accordingly, under the terms of this doctrine, the courts may not deprive the ICC of a meaningful opportunity to determine whether rates are "reasonable." The courts may not, in other words, deprive the ICC of the opportunity to determine reasonableness at a time when this determination will be of some practical significance. To do so would effectively usurp the "law-making power over certain aspects" of the carrier-shipper relationship which has been allocated to the Commission under the ICA.

In this case, an ICC determination that the filed rates are not "reasonable" likely will have little or no practical effect if rendered after petitioners have paid the filed rate because respondent CME is insolvent. Even if the ICC subsequently determines that the filed rates are unreasonably high, petitioners would be forced to stand in line as unsecured creditors of CME in the hope of recovering some (probably small) percentage of the reparations that they would lawfully be due. This outcome nullifies entirely the ICC's law-making authority with respect to rates in violation of the primary jurisdiction doctrine. To satisfy this doctrine, the ICC must have an opportunity to determine the reasonableness of the filed

rates *before* petitioners are required to pay respondents the filed rate.[9]

B. This Court's Holdings Require Courts To Stay An Undercharge Proceeding Against A Shipper And To Refer The Question Of Rate Reasonableness To The ICC Where, As Here, The Shipper Does Not Have An Opportunity To Be Made Whole After A Later Civil Action For Reparations.

1. This Court has made plain that carriers have no legal right to collect rates that are unreasonable. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 204 (1960). Indeed, such rates, while technically "legal," are not "lawful." *Arizona Grocery*, 284 U.S. at 384. Accordingly, where carriers sue for undercharges, they should not automatically be entitled to collect the filed rate. Instead, shippers should be permitted to raise the reasonableness of the filed rate as a defense. In that event, the "established judicial reference procedures under which the Commission would be called upon to aid the court" in determining the reasonableness of the rates should be followed. See H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2923, 2931.[10]

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[9] The rationale for referral is particularly strong in actions for additional monies in which, in addition to disagreeing over the reasonableness of rates, the parties disagree over which tariffs apply in the first place. In such cases, it is inappropriate to require shippers to pay the rates demanded instead of referring the tariff applicability and rate reasonableness disputes to the ICC.

[10] In an ordinary reparations action, a shipper institutes a civil suit against a carrier, which is liable, under the Act, "for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle." 49 U.S.C. §§ 11705(b)(3), 11706(c)(2). To reconcile the requirement that carriers pay reparations for rates that the *Commission* finds unreasonable with the requirement that reparations be recovered in a civil suit, Congress indicated that courts should follow the "established" referral procedure. *See* H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2923, 2931. Congress provided shippers with this reparations remedy to overrule legislatively this Court's decision in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959). *See id.*

While this outcome appears to follow inexorably from the language of the statute, from the primary jurisdiction doctrine, and from considerations of judicial and regulatory economy, this Court has never squarely decided the broader question. Nor must the Court decide here whether courts should stay *all* undercharge actions and refer the question of reasonableness to the ICC, or whether they should require shippers to pay the filed rates and then seek recovery of the difference in separate, sequential actions before the ICC when that procedure will not clearly prejudice either of the parties. This Court, however, on a number of occasions, has either approved of or strongly suggested that courts should follow the former procedure. See, *e.g.*, *Pennsylvania R.R.*, 363 U.S. at 203 (in an undercharge action against the Government, "the Court of Claims [properly] suspended proceedings to enable the parties to have the Interstate Commerce Commission pass on the reasonableness of the rates"); *Western Pacific*, 352 U.S. at 64 ("in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views"); *United States* v. *Chesapeake & Ohio R.R.*, 352 U.S. 77, 81 (1956) (same); *In re Penn Cent. Transp. Co.*, 447 F.2d 841, 844 (3d Cir.), *aff'd sub nom. United States Steel Corp.* v. *Trustees of Penn Cent. Transp. Co.*, 414 U.S. 885 (1973) (describing rate unreasonableness as a legitimate defense).[11]

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[11] *See also Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 223 (1966) (action under Shipping Act must be stayed while issues within jurisdiction of Federal Maritime Commission may be determined by that Commission); *General Am. Tank Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940) ("When it appeared in the course of the litigation that an administrative problem, committed to the [Interstate Commerce] Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act"); *Chicago & N.W. R.R.* v. *Lindell*, 281 U.S. 14, 17 (1930) (allowing counterclaim to carrier's collection action on basis of judicial economy and fact that allowing defense was equivalent of offsetting one judgment against another).

With the exception of the court below, each court of appeals to address this issue, including the Fifth Circuit which stood apart from most other circuits on the issue decided in *Maislin*, has followed these decisions, at least where, as in this case, the carrier is bankrupt. *See Milne Truck Lines, Inc.* v. *Makita U.S.A., Inc.*, No. 91-55059, 1992 WL 152140, at *6 (9th Cir. July 7, 1992); *Advance United Expressways, Inc.* v. *Eastman Kodak*, No. 91-1320, 1992 WL 142813, at *4 (5th Cir. June 26, 1992); *Atlantis Express, Inc.* v. *Standard Transp. Servs., Inc.*, 955 F.2d 529, 536 (8th Cir. 1992); *Duffy* v. *BMC Indus., Inc.*, 938 F.2d 353, 355-58 (2d Cir. 1991); *Rebel Motor Freight, Inc.* v. *ICC*, No. 89-3886, 1991 WL 88354, at *3 (6th Cir. May 28, 1991); *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101, 104-07, *withdrawn in part*, 1990 U.S. App. LEXIS 13339 (1st Cir. 1990); *Western Transp. Co.* v. *Wilson & Co.*, 682 F.2d 1227, 1231-32 (7th Cir. 1982).

On several other occasions, however, in cases not at all like this one, this Court has suggested that shippers sued for undercharges should pay first and then seek reparations in separate actions. In *Pennsylvania R.R.* v. *International Coal*, 230 U.S. 184, 197 (1913), for example, this Court stated, without further analysis, that "[i]f, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay . . . leaving . . . to the [shipper] the right to apply to the Commission for reparation." Likewise, in *Arizona Grocery*, 284 U.S. at 384, this Court stated, after distinguishing "legal" from "lawful" rates, that "the shipper was bound to pay the legal [filed] rate; but if he could show that it was unreasonable he might recover reparation."

These cases do not establish a pay-first rule. To the contrary, these were both cases in which the carrier billed and collected the filed rate. They were not cases, like this one, in which the carrier billed and collected a rate other than the filed rate and then, after the passage of time, alleged undercharges. Thus, these dicta do no more than indicate that the carrier has a legal (as well as practical) right to demand payment of the filed rate at the time of delivery.

Moreover, these were cases in which the outcome of the dispute between the carrier and the shipper did not turn on which procedure for resolving the dispute was followed. They were, more specifically, cases—unlike this one—in which the carriers were intact, ongoing entities, fully capable of repaying the shippers if the ICC later determined that the tariff rates were in fact unreasonable.

The limited applicability of the pay-first dicta is underscored by this Court's decision in *Crancer* v. *Lowden*, 315 U.S. 631 (1942). In that case, decided after *International Coal* and *Arizona Grocery*, the Court strongly suggested that the pay-first approach was not a rule required by the staute, but was instead nothing more than an equitable principle, applicable where the carrier would be materially prejudiced by referral to the ICC and where the shipper could be made whole following a reparations action. Specifically, the *Crancer* Court reasoned that

> [i]f the trial judge had, in the exercise of his discretion, continued the trial of the cause until such time as the Commission had passed upon the reasonableness of the rate, the delay might have made it impossible for the *carrier* to produce the witnesses who had made the inspection of the shipments. On the other hand, the [*shipper*] suffered no hardship as a result of the trial court's insistence on proceeding with the trial. If [the shippers] pay the judgment in this case, and the Commission should, in the [proceeding before it], decide to modify the tariffs, [the shippers] can obtain a *complete remedy* by way of reparation.

Id. at 636 (emphases added).

Although, as these cases demonstrate, this Court has not resolved the question whether courts must refer the issue of reasonableness to the ICC in *all* undercharge actions, it has made abundantly clear that courts must follow this procedure in any situation—unlike the one in *Crancer*—where a shipper may *not* have an opportunity to obtain a "complete remedy" through a separate, sequential action

before the ICC.[12] Specifically, this Court has *required* referral where the statute of limitations bars a shipper's reparations action but not a carrier's undercharge action.

In *Western Pacific*, three railroads sued the United States in its capacity as a shipper of certain war materials to recover the difference between the rate actually paid and the tariff rate that the carriers believed applied to the shipments at issue. 352 U.S. at 60. The Government defended against the railroads' action on the closely related grounds that the higher tariff rate that the railroads advocated was inapplicable and, in any event, was unreasonably high. *Id.* at 61. The Court of Claims entered summary judgment for the railroads, holding that they had correctly identified the governing tariff and that the Government was not entitled to have the rate reasonableness question referred to the ICC because the two-year statute of limitations had run on the Government's cause of action against the carriers for reparations. *Id.* at 62.

This Court reversed. It held that the ICC had primary jurisdiction over rates and that the reasonableness question therefore must be referred by the Court of Claims to the ICC. In so doing, this Court made clear that referral to the ICC was required *because* the Government was barred from seeking reparations in a separate action, *i.e. because* the Government did not have an opportunity to obtain a complete remedy after a separate, sequential legal proceeding. Specifically, this Court stated that "we do not think the [ICA] operates to bar reference to the Commission of questions raised by way of defense in suits which are themselves timely brought. . . . *Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges*

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[12] The Court also has emphasized that court review of ICC proceedings should be structured to favor parties—whether shippers or carriers—who cannot obtain a complete remedy in a subsequent reparations action. *See Burlington N., Inc.* v. *United States*, 459 U.S. 131, 140-42 (1982); *Atchison, T. & S. F. R.R.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 820 (1973).

with impunity. . . ." *Id.* at 71 (emphasis added)."[13]

In this case, as in *Western Pacific*, petitioners would have no opportunity to obtain a complete remedy after a separate, sequential action for reparations. If they are required to pay the filed rate to respondents, and the ICC subsequently determines that the filed rate was unreasonably high, petitioners, as unsecured creditors of respondent CME, will have little or no opportunity to collect full reparations. *Western Pacific* and its progeny, and, arguably, *Cruzcor*, thus require that the district court in this case stay its proceedings and refer the issue of rate reasonableness to the ICC rather than enter judgment against petitioners and require them to seek partial reparations in a separate action.

2. It is particularly appropriate that the reasonableness of the tariff rates be referred to the ICC in this case because the *ICC* has determined that, in cases where the carrier is insolvent, the statutory scheme is best furthered if shippers have an opportunity to adjudicate the reasonableness issue prior to judgment, and that a post-judgment opportunity to seek reparations is not an adequate remedy. *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement* ("*Rate Reasonableness Statement*"), 8 I.C.C.2d 67, 67 (1991). Under this Court's decision in *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), the courts must defer to the ICC's choice of the appropriate means of enforcing the statute.

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[13] *See also United States* v. *Chesapeake & Ohio Ry.*, 352 U.S. 77, 81 (1956) (following *Western Pacific*); *Atlantic Express, Inc.*, 955 F.2d at 536 (recognizing rate reasonableness as defense at least in "those situations where the parties agreed to a negotiated rate and the shipper (or broker) no longer has an adequate reparations remedy at the time it is billed for the undercharges"); *Dutko*, 938 F.2d at 357 ("Whatever the force of the filed rate doctrine and whether or not a shipper must normally pay before challenging the reasonableness of a rate, we think the doctrine need not be applied so strictly as to permit a carrier to delay billing beyond the two-year period of limitations").

In *American Trucking*, this Court held that the Commission has discretionary power to fashion a remedy beyond its express authority in order to further a legitimate statutory purpose if two predicates are satisfied: "[F]irst, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate." *Id.* at 367. In this case, the Commission is clearly seeking to further a "specific statutory mandate"; indeed, it is seeking to further the *core* mandate of the Act that rates charged and collected must be "reasonable." Moreover, the ICC's choice of the most appropriate means of enforcing the statute—affording the shippers the opportunity to challenge the reasonableness of rates at a time when a determination by the Commission will have some practical import—is unquestionably "directly and closely tied to that mandate." Accordingly, this Court's holding in *American Trucking* directly supports the referral petitioners request because it is the ICC's preferred mechanism for enforcing the statute, and this judgment is entitled to respect by this Court.

In sum, the holdings of this Court in *Western Pacific* and *American Trucking* directly control the proper outcome of this case. They require consideration and disposition of a rate reasonableness defense in the same action in which an undercharge claim is asserted. This, in turn, requires referral to the ICC.

C. Sound Policy Considerations Embodied In The ICA Support The Referral Rule.

The rule requiring trial courts to stay undercharge actions by insolvent carriers and refer the issue of reasonableness to the ICC advances the ICA's fundamental rate reasonableness objective without defeating the filed rate requirement. In contrast, requiring shippers to pay first and seek reparations in a separate action defeats the requirement that rates must be "reasonable" and creates a windfall for the estates of bankrupt carriers by allowing them to collect and retain rates that later may be found to be unreasonable.

The referral rule strikes an appropriate balance between the two central provisions of the ICA. It clearly advances the statutory requirement that rates be "reasonable": by providing the ICC—the administrative body charged with determining the reasonableness of rates—with a meaningful opportunity to determine the reasonableness of disputed rates, it assures ultimately that shippers do not pay, and carriers do not collect, rates that are not "reasonable" when that issue properly is raised by a shipper. At the same time, this rule advances the requirement that shippers pay filed rates: in the end, shippers must pay the filed rates, rather than the negotiated rates, if the filed rates are determined to be "reasonable" within the meaning of the statute. There is no question in this case that respondent CME will be paid the filed rate if the Commission determines that the filed rate applicable to petitioners is "reasonable." Moreover, CME is entitled to prejudgment interest in the event that the unpaid charges are found to be reasonable. *Chesapeake & Ohio Ry.* v. *United States Steel Corp.*, 878 F.2d 686, 692 (3d Cir. 1989); *Fawley Motor Lines, Inc.* v. *Cavalier Poultry Corp.*, 235 F.2d 416, 419 (4th Cir. 1956).

Payment of the filed rate, of course, will be delayed under the referral rule. Where the carrier is insolvent, however, delay does not undermine the purposes of the filed rate requirement. See *supra* pp. 12-13. It cannot possibly lead to discrimination against shippers; the negotiated rates were paid long ago, and any discrimination that may be reflected in these rates cannot be cured by requiring shippers to pay higher rates which have never been reviewed by the Commission. Moreover, in the bankruptcy context, delays in the payment of the filed rates do not interfere with carriers' timely collection of their charges. Insolvent carriers—precisely because they are no longer operating—do not require a constant and predictable cash flow to preserve their solvency. *Rate Reasonableness Statement*, 8 I.C.C.2d at 68.

Moreover, this Court should not be concerned with delays resulting from "unreasonableness" defenses that

lack merit. Courts have the power to sanction litigants that raise meritless claims, Fed. R. Civ. P. 11, and the ICC has the authority to dismiss meritless claims referred to it. In any event, referring courts cannot require a threshold showing of merit without infringing upon the ICC's primary jurisdiction to determine rate reasonableness questions in their entirety. And if courts were to establish such a threshold requirement, parties would likely waste time and resources litigating over the threshold requirement that would be better expended in resolving the reasonableness issue itself. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting) ("Nothing is more wasteful than litigation about where to litigate . . .").

In contrast to the referral rule, a pay-first approach, when applied in the bankruptcy context, upsets the statutory balance, creates perverse incentives for carriers, and is extremely inequitable. First, it elevates the filed rate requirement to an unwarranted position of superiority over the reasonableness requirement. Indeed, by ignoring the fact that a judgment favoring a shipper in a reparations action would, as a practical matter, be unenforceable, it entirely guts the statutory reasonableness requirement. Unless shippers can obtain complete relief, they will be required to pay an unreasonable rate in flat violation of 49 U.S.C. § 10701(a). Nothing else in the statute or anything in this Court's decisions under the statute supports this result.

Moreover, because a reparations judgment would be unenforceable, a pay-first rule effectively nullifies the reparations provisions of 49 U.S.C. §§ 11705 and 11706, which expressly authorize shippers to seek reparations *and* make carriers liable for these damages. See *supra* n. 10. Of course, if shippers were unsecured creditors of bankrupt carriers, they would have no right fully to enforce reparations judgments against carriers. As a general rule, however, the shippers in cases such as this are *not* creditors of the carriers, and they should not arbitrarily be converted to that status.

It is entirely fanciful to argue, as the court of appeals did in this case, that the shippers are no worse off by paying first than if they had simply paid the tariff rates in the first instance. Pet. App. 10a. The tariff rates, which were often as much as 100% higher than the negotiated rates, were far too high to move traffic in the competitive market in which they would have been charged, and thus those rates *never would have moved traffic* in the first instance. If, for example, respondent CME had billed petitioners for the full undiscounted class rate in the first instance, petitioners would have immediately ceased using respondent and patronized another carrier which offered market rates.

Second, requiring shippers to pay first creates a perverse incentive for carriers *not* to file rates. Under this approach, if the carriers fail to file rates, they can, if they choose, take a second bite at the apple. If they lose in their subsequent undercharge action, they are no worse off than if they had filed the negotiated rates in the first place; if, on the other hand, they win—or if they induce shippers to settle—they can collect rates far higher than they ever would have received in the marketplace.

Finally, the pay-first approach is extremely inequitable. Carriers have no right to retain any more than the lawful rate. Yet, under this approach, carriers that violate—even knowingly or fraudulently—*their* statutory obligation to file negotiated rates, can recover unlawful rates and never be required fully to disgorge their unlawful profits.[14] Shippers, by contrast, who are *not* statutorily responsible for filing rates, and who in fact cannot file rates, would be required to pay unlawful rates without any possibility of subsequent recovery.

The ICA was designed to regulate carriers, and the Act properly places responsibility for tariff compliance on carriers. Requiring shippers to pay first ignores this

[14] In this case, for example, respondent CME led petitioners to believe that it had filed the negotiated rates. Pet. App. 32a-33a; 92a-93a.

fundamental statutory premise, nullifies the statute's "reasonableness" and reparations provisions, creates perverse incentives for carriers not to file rates, and provides violators of the statute with an opportunity to collect windfall profits. Accordingly, rate reasonableness should be a defense to respondents' undercharge claims in this case.

D. Nothing In Bankruptcy Law Requires The Court To Ignore The ICA And To Reject The Reasonableness Defense And The Immediate Referral Rule.

No specific provision of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, controls this case. Nevertheless, contrary to the suggestion of the court of appeals, the Code, and the common law principles of bankruptcy underlying the Code, fully support the argument that a shipper must be permitted to defend against an undercharge claim on the ground that the filed rates were unreasonable and have that defense referred to the ICC.

First, it is axiomatic that the rules of bankruptcy must not be interpreted to permit "creat[ion of] a windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961). See also *In re Midwest Serv. & Supply Co.*, 44 B.R. 262, 265 (D. Utah 1983) (debtor "may not assert the automatic stay as a weapon to obtain the benefits" of a transaction and "simultaneously prevent the [creditor] from netting out . . . the recoupment . . ."). In this case, respondent CME, if it had remained solvent, would not be permitted under the ICA to retain the filed rate if the ICC determined, in the context of a reparations action by petitioners, that the filed rate was not "reasonable." Yet CME, precisely because it is insolvent, will be permitted to collect *and retain* the filed rate if the pay-first procedure is followed in this case. Respondents will, in other words, "merely by reason of the happenstance of bankruptcy" be permitted to create precisely the sort of "windfall" that the Code forbids. Only by adjudicating the rate reasonableness issue before judg-

ment is entered against petitioners can the serious risk of a windfall be eliminated.

Second, the Bankruptcy Code does *not* embrace a rule of increasing the pool of money available to creditors at all costs. As a general matter, the Code does require an entity that owes a debt to the bankruptcy estate to pay that debt on demand. 11 U.S.C. § 542(b). The Code expressly recognizes, however, that this general "turnover" rule does *not* govern cases in which the entity that owes the estate has a countervailing claim or defense against the estate arising out of the same or a different transaction. Specifically, when claims arise out of the same transaction, a creditor that is also a debtor of an estate is entitled to raise the defense of recoupment against any claim by the estate. See, *e.g.*, *In re B & L Oil Co.*, 782 F.2d 155, 157 (10th Cir. 1986); *In re Monongahela Rye Liquors, Inc.*, 141 F.2d 864, 869 (3d Cir. 1944).[15] Similarly, when the claims arise from separate transactions, Section 553 of the Code provides that bankruptcy "does not affect the right of a creditor to offset a mutual debt owing by such creditor to the debtor . . . against a claim of such creditor against the debtor . . . ." 11 U.S.C. § 553(a).

Thus, an entity that is both a debtor and a creditor of the bankruptcy estate is *not* required to pay first and collect later. To the contrary, it is entitled to set off the debt it owes against the debt it is owed (or to recoup any amount it is owed), and to pay only the balance due. See, *e.g.*, *In re Bevill, Bresler & Schulman Asset Management Corp.*, 896 F.2d 54, 57 (3d Cir. 1990); *United States* v. *Brunner*, 282 F.2d 535, 537 (10th Cir. 1960); *Prudential Ins. Co.* v. *Nelson*, 101 F.2d 441, 443 (6th Cir.) ("it is only the balance which is the real and just sum owing by or to the bankrupt"), *cert. denied*, 308 U.S. 583 (1939).[16]

[15] Recoupment is an equitable doctrine applied by bankruptcy courts to prevent "unjust enrichment." *In re B & L Oil Co.*, 782 F.2d 155, 159 (10th Cir. 1986). "Under recoupment, a [creditor can] meet a [debtor's] claim with a countervailing claim that arose 'out of the same transaction.'" *Id.* at 157. The availability of the recoupment defense follows from the fundamental principle of bankruptcy law that a debtor's claim remains subject to otherwise available defenses. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 82, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5868; H. Rep. No. 595, 95th Cong., 2d Sess. 367-68, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6323-24.

This Court has long recognized that the rule permitting recoupment and setoffs is both logical and fair. More than 75 years ago the Court noted that the right to set off mutual claims

> is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries and suit is brought by one against the other, the defendant, *to avoid a circuity of action*, may interpose his mutual claim by way of defense . . . .

Studley v. *Boylston Bank*, 229 U.S. 523, 528 (1913) (emphasis added). "Such counterclaims," the Court continued, "can be asserted as a defense or by the voluntary act of the parties, *because it is grounded in the absurdity of making A pay B when B owes A.*" *Id.* (emphasis added).[17]

[16] Indeed, the clear weight of authority holds that a claimant that is both a debtor and creditor of a bankruptcy estate is entitled under Section 553 to assert a prepetition claim against the estate as a defensive setoff even where the estate's debt has been discharged, *i.e.*, even where the claimant has no legal right otherwise to collect the debt it is owed by the estate. *See, e.g., In re DeLaurentiis Entertainment Group, Inc.*, 3 Bankr. L. Rep. (CCH) ¶ 74,569, at 78,474 (9th Cir. 1992); *In re Davidovich*, 901 F.2d 1533, 1539 (10th Cir. 1990); *In re Morgan*, 77 B.R. 81, 84-85 (Bankr. S.D. Miss. 1987).

[17] *See also In re Anchorage Int'l Inn, Inc.*, 16 B.R. 308, 313 (Bankr. D. Alaska 1981) ("The rules of setoff were created to remedy the unfairness perceived in requiring a creditor to pay his debts in full to the bankrupt, while granting the creditor only a percentage of debts owed him by the bankrupt"); W. Norton, *Norton Bankruptcy Law and Practice*, § 33.01 (1981) ("In the absence of a recognition of the right to a setoff, the creditor might be forced to pay in full the amount owed to the debtor, but be limited to no more than a pro rata recovery of his claim against

In sum, it is antithetical to the Bankruptcy Code to permit an entity seeking refuge in the Code to obtain a windfall from its creditors. Thus, the Code has long recognized the "absurdity" of forcing a creditor that is also a debtor to pay in full and be repaid only in part. Accordingly, to the extent bankruptcy law is relevant to this case, its principles support allowing the reasonableness issue to be decided as a defense to this action and to have the matter referred to the ICC.

* * * *

The core requirement of the Interstate Commerce Act is that carriers must charge rates that are "reasonable." For this reason, shippers must be permitted to defend against claims for payment of the filed rate on the ground that the filed rate was not "reasonable" in situations where the carrier billed and collected a lower rate at the time of the shipment. This defense must be referred to the ICC, which has primary jurisdiction to determine the reasonableness of rates. At a minimum, shippers must have the opportunity to have the reasonableness issue referred to the ICC in cases in which they will not have an opportunity to obtain a complete remedy from the carrier after a separate, sequential reparations action. In this case, petitioners paid the amounts billed by respondent CME at the time CME transported petitioners' goods. And, because CME is insolvent, petitioners will be denied their statutory right to pay no more than the "reasonable" rate if they are required to pay the filed rate and the ICC subsequently determines that this rate was not "reasonable." Accordingly, petitioners must be permitted to raise the rate reasonableness defense in this action, and they are entitled to have the reasonableness issue resolved by the ICC in this case and not in a separate reparations action.

CONCLUSION

The judgment of the court of appeals should be reversed.

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the debtor. The process of imposing this loss *on an otherwise innocent party* has historically been thought to be improper") (emphasis added).

Respectfully submitted,

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APPENDIX

Amicus The National Industrial Transportation League ("League") is comprised of approximately 1300 shippers and groups and associations of shippers conducting large, medium, and small industrial and commercial enterprises in every state. The members of the League are substantial users of transportation by motor common carrier. It is estimated that League members, directly or indirectly, are responsible for the routing of approximately 80% of the nation's freight.

Amicus The National Small Shipments Traffic Conference, Inc. is an association with approximately 275 shipper members throughout the United States. The members of this Conference ship primarily via motor common carriers.

Amicus The Health and Personal Care Distribution Conference, Inc. is comprised of approximately 70 companies that manufacture and ship drugs, medicines, and personal care items throughout the nation. The members of this Conference ship primarily via motor common carriers.

Amicus The International Mass Retail Association ("IMRA") represents over 120 mass retail companies, including discount department stores, specialty hardline and softline discounters, warehouse clubs, and other mass retailers. IMRA's members operate more than 40,000 stores in all 50 states, employ more than 1.5 million Americans, and comprise the overwhelming majority of the $170 billion U.S. mass retail industry. IMRA members are major users of common carriers.

Amicus The Rubber Manufacturers Association ("RMA") is a cooperative manufacturing trade association comprised of about 200 rubber manufacturers. Because a high percentage of its members' traffic moves by motor carrier, RMA has been deeply involved in the legislative effort to find a solution to the undercharge problem through its participation in the Coalition for an Under-

charge Relief Bill. To date, RMA's members have received more than 3,000 undercharge claims for over $898,000, with estimates for future claims in excess of $1 billion.

Amicus The Transportation Brokers Conference of America ("TCBA") is a trade association representing approximately 1200 general commodity transportation brokers throughout the country. TBCA's membership ranges from small specialized freight brokers to larger corporate distribution and logistic service providers. The pay-first requirement advocated by respondents would impair, if not preclude, the ability of many, if not all, brokers, to defend meritless claims. Moreover, many brokers would face bankruptcy if they were unable ultimately to recover monies paid to insolvent carriers.

Amicus The Transportation Claims and Prevention Council, Inc. ("TCPC") is a voluntary, not-for-profit organization of approximately 500 firms nationwide. TCPC's primary purpose is to assist its members in managing freight claims functions. While "freight claims" frequently involve disputes between shippers and carriers over lost and damaged cargo, they may also encompass transportation pricing disputes—for example, claims by shippers against carriers for reimbursement of "overcharges," or, as here, undercharge claims by carriers against shippers. TCPC member firms use all modes of freight transportation, including motor common carriers.

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In The

Supreme Court of the United States

October Term, 1992

IN RE: CAROLINA MOTOR EXPRESS, INC.,

Debtor.

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,

Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Amicus curiae will address the following question:

In a civil action by an insolvent common carrier to enforce and collect its unambiguous filed tariff rate (the "filed rate") from a private shipper, must the trial court delay enforcement of that rate merely because the shipper alleges that the rate is unreasonable, even though:

1. the shipper may protect its right to recover reparations for payment of an unreasonable filed rate by depositing it with the court under Rule 67 of the Federal Rules of Civil Procedure as amended in 1983;

2. enforcement of the filed rate is "utterly central" to the Interstate Commerce Act (*Maislin*, 111 L.Ed.2d at 112);

3. a filed rate is binding unless and until suspended by the ICC;

4. the plain meaning of the Interstate Commerce Act conflicts with a shipper's purported implied right to withhold payment, and the legislative history of the reparations provisions does not show a clear intent to overrule *Crancer v. Lowden*, 315 U.S. 631 (1942);

5. Congress in 31 U.S.C. § 3726 only granted the United States, not private shippers, a right to withhold payment; and

6. permitting the shipper to withhold payment of the filed rate will prejudice both solvent and insolvent carriers?

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BRIEF OF LEONARD L. GUMPORT, TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus curiae is Leonard L. Gumport, the chapter 7 bankruptcy trustee of the estate of Transcon Lines. Transcon Lines was a major motor common carrier with annual revenues in excess of $200 million.

Transcon Lines collapsed during the period of illegal rate destabilization promoted by the ICC under its *Negotiated Rates* policy. In May 1990, health, welfare and pension plans of Transcon Lines filed an involuntary bankruptcy petition against it. In June 1990, less than 30 days before this Court invalidated the ICC's *Negotiated Rates* policy in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. ___ (1990), the Bankruptcy Court for the Central District of California appointed Mr. Gumport as trustee of Transcon Lines.

During the *Negotiated Rates* regime, Transcon Lines operated at a deficit while granting secret discounts to attract and hold the trade of shippers. Among other things, Transcon Lines funded the deficits caused by its rate discounts by: (1) wage concessions from its employees, (2) defaults on payments to their health, welfare and pension plans, and (3) neglect of its legal duty to conduct environmental clean up of the underground fuel storage tanks at its truck terminals throughout the country.

Once a source of jobs for more than 3,000 employees throughout the United States, Transcon Lines now has only two employees. It has no business operations. It has thousands of creditors, including former employees, their benefit funds, equipment lessors, and landlords. Its primary activities consist of efforts to recover illegal discounts and to remediate and sell its polluted truck terminals.

Although Transcon Lines went bankrupt while granting secret discounts to shippers, the recipients of these illegal discounts now contend that any payment by them

should be delayed while they litigate the reasonableness of Transcon Lines' filed tariff rates. The shippers' evidence that Transcon Lines' filed rates are unreasonable include Transcon Lines' illegal, unfiled rates (which helped to bankrupt Transcon Lines), and the secret discount rates of other carriers (who may have offered non-compensatory rates to solicit or hold business while the ICC abdicated its duty to enforce the tariff system).

Beginning in 1990, the ICC sought to halt the filed rate collection effort of the Transcon Lines trustee. *See ICC v. Transcon Lines*, ___ F.2d ___ (9th Cir., June 17, 1992)(petitions for rehearing pending). On March 10, 1992, the Chairman of the ICC publicly condemned the filed rate doctrine as a "dinosaur." *See* Appendix A. The ICC has indicated that it may revive its illegal *Negotiated Rates* policy through the subterfuge of making unfiled rates evidence that filed tariff rates are unreasonable and therefore unenforceable. *See Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 74 (1991).

Perceiving that the ICC will adhere to its view that unfiled rates should be enforced, shippers now seek wholesale referral of filed rate litigation to the ICC for rate reasonableness hearings. In the meantime, the former employees of Transcon Lines remain unpaid, the polluted truck terminals remain unremediated, the ICC publicly scorns as a "dinosaur" the statutory tariff system mandated by Congress, and money that shippers should

disgorge or pay into court under Fed.R.Civ.P. 67 is consumed instead in legal fees.[1]

SUMMARY OF ARGUMENT

Petitioners should pay the filed rate, and the ICC should enforce the tariff system as urged by Respondents. Petitioners and their amici create a false dilemma by failing to mention the provisional remedy provided by Fed.R.Civ.P. 67. As amended in 1983, Rule 67 permits Petitioners to preserve their right to reparations by paying the filed tariff rate into the registry of the trial court.

To allow Petitioners to delay payment of the filed rate during protracted ICC hearings on rate reasonableness would undermine the "utterly central" policy of enforcement of the filed rate. Withholding payment of the filed rate prejudices both solvent and insolvent carriers. The plain meaning of the Interstate Commerce Act is inconsistent with an implied right to withhold payment of the filed rate. An unsubstantiated claim of rate unreasonableness never justifies agency referral. Illegal, unfiled rates are not competent evidence of the unreasonableness of filed rates.

This case does *not* involve the admittedly "unique" right of set-off that Congress did give to the United States in 31 U.S.C. § 3726. *See* brief of amicus ICC at 13 n.7.

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent will be filed with the Clerk of this Court.

ARGUMENT

I. FED.R.CIV.P 67 PROVIDES A REMEDY FOR PETITIONERS' FALSE DILEMMA, SO THAT THERE IS NO REASON TO OVERRULE *CRANCER v. LOWDEN* OR TO UNDERMINE THE "UTTERLY CENTRAL" PURPOSE AND PLAIN MEANING OF THE INTERSTATE COMMERCE ACT

A. Petitioners' False Dilemma

Petitioners have no valid excuse to withhold payment of the filed rate. They can and must pay it – either to the carrier or the court registry

In their statement of issue and throughout their briefs, Petitioners and their amici emphasize that this case involves an insolvent carrier. Petitioners argue that their right to recover reparations is meaningless unless Petitioners have an implied statutory right to withhold payment of the filed rate pending final ICC adjudication of rate reasonableness claims.

Respondents refute those arguments. Further, as described below, Petitioners' purported dilemma does not in fact exist. Private shippers sued by an insolvent carrier can preserve the right to recover reparations by paying the filed rate into the registry of the court. This remedy is consistent with the statutory language and the policy of strict enforcement of the filed rate doctrine. The remedy proposed by Petitioners – judicial creation of a right to withhold payment until the ICC conducts protracted rate review proceedings – is not.

B. Fed.R.Civ.P. 67 Makes *Crancer v. Lowden* Equally Applicable To Filed Rate Claims Of Insolvent Carriers

More than five decades ago, this Court held that a trial court has discretion to enforce a carrier's filed rate claim against a shipper without waiting for the ICC to decide the shipper's rate reasonableness claims against the carrier. *Crancer v. Lowden*, 315 U.S. 631 (1942). In holding that the trial court correctly proceeded to enforce the carrier's filed rate claim, the Court noted that it was "important to aid the efforts of a carrier in collecting published charges in full." *Id.* at 635.

Petitioners and their amici do not ask this Court to overrule *Crancer*. Instead, they attempt to distinguish it on the ground that it involved a solvent carrier who could make the shipper whole if the ICC awarded a reparations claim. In fact, the Court in *Crancer* did not state that the carrier was solvent, and stated only that a reparations claim was a "complete remedy. . . . " *Id.*, 315 U.S. at 635.

After *Crancer* was decided, Fed.R.Civ.P. 67 was amended to provide a provisional remedy to a defendant that owes money to a plaintiff but claims an interest in that money. Under Rule 67, when an insolvent carrier sues to recover a filed rate from a shipper, the shipper can fully preserve its ability to recover reparations by paying the filed rate into the registry of the court. Rule 67 provides:

> In any action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing.

The 1983 amendment to Rule 67 broadened it to permit a party who claims an interest in the deposited funds to make the deposit. *See Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1474-75 (5th Cir. 1987), *modified* 831 F.2d 557 (1987)(in dispute between public utilities, the district court properly utilized Rule 67 to permit one utility to deposit disputed payments into court registry).

Petitioners should have utilized Rule 67 if they wanted to preserve their right to recover reparations. Petitioners do not even mention Rule 67, because Petitioners do not want reparations. They want to withhold payment. If the Court condones this, failed carriers will suffer the kind of protracted bankruptcy proceedings that are a national disgrace. Other marginally solvent carriers will fail when their filed rate claims are met with spurious rate reasonableness defenses. Petitioners must obey the law and pay the filed rate.[2]

C. The Primary Jurisdiction Doctrine Does Not Permit Referral To The ICC Of A Filed Rate Claim When The Meaning Of The Tariff Is Not In Dispute

When an issue is not within the primary jurisdiction of an agency, then a trial court has no power to refer that

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[2] The defects in the proposed remedies of set-off and recoupment are discussed in Sections I.E.2 and I.E.3 of this brief.

issue to the agency. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1950). In *Montana-Dakota*, the Court stated:

> If the court is presented with a case it can decide[,] but *some issue* is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer *that issue*. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. 341 U.S. at 254 (emphasis added).

This principle compels the conclusion that enforcement of an unambiguous filed rate should not be referred to the ICC under the primary jurisdiction doctrine. Unless a tariff is ambiguous, a court should not refer the issue of tariff interpretation to the ICC. *See United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 69 (1956), *citing Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) and *Crancer v. Lowden*, 315 U.S. 631 (1942). Further, after determining the applicable filed rate, the trial court has discretion to proceed to enforce the carrier's filed rate claim, regardless of the pendency of administrative reparations proceedings. *Crancer*, 315 U.S. at 635.

D. The Filed Rate Doctrine Is "Utterly Central" To The Interstate Commerce Act And Would Be Undermined By A Rule That Permits A Shipper To Withhold Payment Of The Filed Rate Pending A Hearing On Rate Reasonableness

The filed rate doctrine is "utterly central" to the administration of the Interstate Commerce Act. *Maislin*

Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. ___, 111 L.Ed.2d at 112, *quoting Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986)(Scalia, J.). This policy precludes imposing a judicial gloss on the Act that would undermine this statutory purpose, especially when a more plausible interpretation would further this purpose. *See Maislin*, 111 L.Ed.2d at 110-11 (ICC could not utilize its agency expertise to justify adopting a rule that would undermine the statutory filed rate doctrine).

Petitioners and their amici overlook *Maislin's* ruling that compliance with the statutory filed rate doctrine in 49 U.S.C. §§ 10761 and 10762 is "utterly central" to the administration of the Act. *Maislin*, 111 L.Ed.2d at 112. Instead, they incorrectly assert that rate reasonableness – not the filed rate doctrine – is the "bedrock," the "core," the "cornerstone," and the "central requirement" of the Act. *See* brief of amicus National Industrial Transportation League et al., ("NITL") at 3, 9, 10 and 11. NITL cites no authority for these assertions, which contradict *Maislin*.

Petitioners and their amici similarly overlook inconvenient language from *Maislin* when they quote out of context *Maislin's* assertion that "the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 111 L.Ed.2d at 109; *see* brief of amicus NITL at 13. In the very same paragraph of text, the Court in *Maislin* explained: *"Unless and until suspended or set aside,* [the filed rate] is made, for all purpose, the legal rate. . . . " *Maislin*, 111 L.Ed.2d at 109, *quoting Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)(emphasis in original). This overlooked language contradicts the position of Petitioners and their amici that a shipper has a

right to withhold payment of the filed rate *before* the ICC suspends or sets aside the rate. On the contrary, this language compels the conclusion that a shipper must pay the filed rate, and is excused from that legal duty only in the event that the ICC actually does suspend or set aside the filed rate.

Petitioners and their amici want the filed rate doctrine transformed into a "filed opening bid" doctrine. Under the "filed opening bid" doctrine, the filed tariff rate would merely signify what the carrier proposed to receive as payment; the shipper would remain free at all times to object to the filed opening bid as unreasonable. Under this system, neither the shipping public nor the ICC would know from the carrier's filed tariffs what rates were actually in effect. Discrimination would be facilitated and unfiled, secret rates would proliferate.[3]

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[3] In recommending enactment of the filed rate doctrine in the landmark Interstate Commerce Act, the Senate Select Committee on Interstate Commerce emphasized that rigid adherence to the published rate was necessary:

> The posting or publication of railroad rates would be of no advantage to the public unless the law contemplates and requires that the schedules established and posted are strictly adhered to. If variations from the published rates are to be permitted, it would be useless to have them posted. So far as that is concerned, information as to the *ostensible* rates is now sufficiently accessible to the public, and posting them would only impose a needless annoyance and useless expense upon the corporations.

S.Rep.No. 46, 49th Cong., 1st Sess. 200 (1886)(emphasis in the original).

E. The Plain Meaning Of The Act Is Inconsistent With An Implied Statutory Right To Withhold Payment Of The Filed Rate Pending ICC Determination Of The "Reasonable" Rate

1. The Plain Meaning Of The Act Conflicts With An Implied Right To Withhold Payment

"The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989), *quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 546, 571 (1982).

The Interstate Commerce Act does not contain any provision that expressly states that rate unreasonableness is a defense to enforcement of the filed rate, or that a private shipper has a right to withhold payment of the filed rate pending agency referral. Consistent with the "utterly central" policy of requiring payment of the filed rate (*Maislin*, 111 L.Ed.2d at 112), the statutory language provides only that the shipper may recover "for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle." 49 U.S.C. § 11705(b)(3). If Congress meant this provision to create a new statutory defense to the duty to pay the filed rate, Congress certainly forgot to say so.

Instead, it appears that Congress sensibly balanced the "utterly central" policy of strict enforcement of the filed rate against the shipper's interest in paying only reasonable rates. Instead of creating a defense to the

"utterly central" filed rate doctrine, Congress did what it said and said what it meant: it gave the shipper a limited right to assert a claim for damages if the filed rate proved to be excessive. But that claim did *not* constitute a defense to the carrier's statutory filed rate claim. Congress created only a limited, express exception to this rule for the United States as a shipper. *See* 31 U.S.C. § 3726.

The Court should not override the plain meaning of the Act when: (1) that plain meaning furthers the "utterly central" policy of the Act of strict enforcement of the filed rate (*Maislin*, 111 L.Ed. at 112), and (2) that plain meaning is not "demonstrably at odds" with the legislative history of the Act (*United States v. Ron Pair Enterprises, supra*, 489 U.S. at 242). Petitioners and their amici fail to identify any legislative history that "demonstrably" shows the unequivocal intent of Congress to create a new statutory defense to filed rate claims.

Elsewhere, the ICC has admitted that Congress in fact declined to give the ICC the broad reparations powers for which it lobbied. *See Informal Procedure For Determining Motor Carrier And Freight Forwarder Reparation*, Ex Parte No. 249 (Sub-No. 1), 335 I.C.C. 403, 408 (1969)("Shippers were thus not given the option, as recommended by the Commission, of proceeding initially before either the Commission or the Court in seeking . . . redress"). If rate reasonableness was "utterly central" to the Act, Congress presumably would have given shippers the express right to withhold payment while they went to the ICC for protection. Further, if Congress had intended to overrule *Crancer v. Lowden*, 315 U.S. 631 (1942), then the legislative history and statutory

language presumably would contain express statements to that effect.

2. The Plain Meaning Also Conflicts With A Right Of Set-Off

The plain meaning of the statute also conflicts with an interpretation that would permit the shipper to exercise a right of set-off. A shipper cannot have a right of set-off if its right to assert the unreasonableness of a filed rate arises only after making payment. If Congress meant to create an unreasonableness defense or a right of set-off, it should have said so. Congress did not say so, except for the United States in 31 U.S.C. § 3726. This Court should not rewrite the Act so as to undermine its "utterly central" policy of strict enforcement of the filed rate. *See Maislin*, 111 L.Ed.2d at 112. Rewriting the statute in this fashion would be the equivalent of demoting the importance of the filed rate.[4] The carrier must collect and the shipper must pay the filed rate.

The ICC has elsewhere admitted that permitting a right of set-off undermines the Act. *See Regulations for Payment of Rates and Charges – Penalty Charges – for Nonpayment (49 CFR Part 1320)*, ICC Ex Parte No. MC-1 (February 17, 1988). There, the ICC explained why it would *not* promulgate a rule to permit shippers to exercise a right of set-off:

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[4] The bankruptcy filing of a carrier does not create a right of set-off. Bankruptcy law preserves a right of set-off that arises prior to bankruptcy, but does not create a right of set-off that did not exist independently of the bankruptcy. *See* 11 U.S.C. § 553(a); 4 *Collier on Bankruptcy* ¶553.06, at 553-38 (15th ed. 1992) ("Prepetition set-offs are governed by applicable non-bankruptcy law").

Other matters. Several shipper groups propose that, if we promulgate final rules, we incorporate a mechanism into the tariff-rule methods that would allow shippers to toll the time at which they become liable for collection charges. They aver that if they have a legitimate dispute over an assessed transportation rate they should be allowed to file with the carrier (within a short time period after completion of the transportation) a letter disputing the rate. The shippers suggest that, as long as a shipper legitimately disputes the rate and is not lodging a *pro forma* protest, then such a letter of protest should exculpate it from collection charges. *We decline to adopt such a provision*. We believe it is impractical. The distinction between a legitimate, honest protest and an illegitimate *pro forma* protest is not an easy distinction and would likely generate a flood of unnecessary litigation. *It is also too easily susceptible to unequal application and thus could promote unlawful discrimination. Finally, as noted supra, shippers are obligated to pay first. Set-offs of freight charges are not lawful. Id.* at 6 (emphasis added and footnote omitted).

The ICC made these observations without even considering the possible use of Fed.R.Civ.P. 67. Rule 67 makes the quoted reasoning of the ICC even more strongly militate against judicial creation of a right of set-off.

3. The Plain Meaning Conflicts With The Proposed Equitable Right Of Recoupment

Petitioners' amici suggest that their right to reparations justifies judicial creation of an implied right of

"recoupment." *See* brief of amicus NITL at 28. This argument does no more than give another label to the incorrect conclusion that the Act permits a shipper to withhold payment of the filed rate.

The proposed implied right of "recoupment" must be rejected for an additional reason. Petitioners' amici admit that: "Recoupment is an *equitable* doctrine. . . . " *See* brief of amicus NITL at 28 n.3 (emphasis added). But *Maislin* precludes judicial creation of equitable defenses to enforcement of the filed rate. The Court stated in *Maislin*:

> Given the close interplay between the duties imposed by [49 U.S.C.] §§ 10761-10762 and the statutory prohibition on discrimination, *see* § 10741, this Court has read the statute to create strict filed rate requirements *and to forbid equitable defenses to collection of the filed tariff*. 111 L.Ed.2d at 108 (emphasis added).

F. Agency Referral Based On Unsubstantiated Claims Of Filed Rate Unreasonableness Will Undermine The Filed Rate Doctrine And Condone Illegality

"[I]n order to merit reference of a matter to the ICC, a shipper must provide more than a bald, conclusory allegation of rate unreasonableness." *In re Oneida Motor Freight v. Ormond Shops*, 126 B.R. 431, 442 (D.N.J. 1991)(collecting authorities). "[T]he district court need not refer the issue of reasonableness to the ICC if there is no reasonable likelihood that the ICC will reach a determination favorable to the shipper." *Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, ___F.2d ___ (9th Cir., July 7, 1992). Similarly, when a tariff is unambiguous, this Court has

refused to refer it to the ICC for interpretation. *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922).

In light of these principles, a shipper should have no right to agency referral of a reparations claim absent evidence from which the ICC could reasonably decide in the shipper's favor. This Court should halt now the latest effort to nullify the filed rate doctrine and to revive the ICC's illegal *Negotiated Rates* policy. This new defense tactic, condoned by the ICC, relies on this syllogism:

> – Illegal unfiled rates are legitimate evidence of "reasonable" rates.
>
> – When a carrier's filed rate is higher than an unfiled rate, then the carrier's filed rate is unreasonably high.
>
> – Therefore, the shipper is entitled to pay only the unfiled rate, *Maislin* is overruled, and *Negotiated Rates* is reinstated.

This syllogism has the same defect as the ICC's illegal *Negotiated Rates* policy that this Court rejected in *Maislin*. In *Maislin*, the ICC attempted to enforce unfiled rates by declaring that it was an "unreasonable practice" for a carrier to attempt to collect its filed rate after agreeing to an unfiled rate. The ICC called this policy its *"Negotiated Rates"* policy. In rejecting this policy, *Maislin* held that the filed rate doctrine prohibits the ICC from adopting a policy *"sanctioning adherence to unfiled rates"* because such a policy "undermines the basic structure" of the Interstate Commerce Act. *Maislin*, 111 L.Ed.2d at 112 (emphasis added).

Unfiled rates therefore cannot legally serve as evidence to support agency referral of a reparations claim. Under the filed rate doctrine as defined in *Maislin*, an illegal, unfiled rate cannot be used to show that a filed rate is "unreasonable." Otherwise, a carrier would risk liability for reparations based on evidence of unfiled rates. This would sanction adherence to unfiled rates, and *Maislin* expressly forbids any policy "sanctioning adherence to unfiled rates. . . ." *Maislin*, 111 L.Ed.2d at 112.[5]

Despite *Maislin's* mandate, the ICC recently noted that it historically has considered "a carrier's proffer of a particular rate" to be evidence of rate unreasonableness. *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 74 (1991); *see also* amicus brief of ICC at 6 n.5. The obvious implication of this post-*Maislin* comment is that the ICC may use unfiled rates to support findings of rate unreasonableness.

---

[5] The standard for referral should be that the shipper must submit competent evidence from which the ICC reasonably could find that the filed rate of the carrier is unreasonable, taking into account the "reasonable profit" standard of 49 U.S.C. § 10701(e) and the national transportation policies stated in 49 U.S.C. § 10101. "Competent evidence" would not include illegal, unfiled rates.

The national transportation policies stated in 49 U.S.C. § 10101 include: (a) "to promote safe, adequate, economical, and efficient transportation" (§ 10101(a)(1)(B)), (b) "to encourage sound economic conditions in transportation, including sound economic conditions among carriers" (§ 10101(a)(1)(C)), (c) "to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices" (§ 10101(a)(1)(D)), and (d) "to encourage fair wages and working conditions in the transportation industry" (§ 10101(a)(1)(F)).

G. The Rule Urged By Petitioners Would Be Highly Prejudicial To Both Solvent And Insolvent Carriers

Petitioners' amici contend that no prejudice will result to a bankrupt carrier if its filed rate claim is postponed pending the outcome of the referral of the shipper's rate unreasonableness claim. *See* brief of amicus ICC at 22; brief of amicus NITL at 24. On the contrary, the rule urged by the ICC will prejudice both insolvent and solvent carriers and will needlessly undermine the filed rate doctrine.

A rule that permits a shipper to delay payment of the filed rate based on a claim of rate unreasonableness will inevitably invite shippers to assert such claims, regardless of their merit. Prejudice will result to all carriers:

A. All carriers will frequently be forced to deviate from all filed rates, regardless of whether they are reasonable rates. In order to obtain prompt payment and to avoid the cost of litigation, carriers will frequently accept less than the filed rate in "settlement" of spurious rate reasonableness defenses. Unless such "settlements" are publicized and filed with the ICC (an unlikely scenario), they will in substance constitute secret, unfiled, ratemaking agreements.

B. Carriers that do not settle spurious reasonableness claims will frequently suffer increased delays in payment while the carriers endure interminable administrative proceedings on spurious rate reasonableness defenses. A marginally solvent carrier will go bankrupt from delays in payment based on spurious rate reasonableness claims. A bankrupt carrier will be unable to

make prompt distributions to creditors on their claims during the pendency of protracted litigation.[6] Unsecured creditors of a bankruptcy estate are acutely prejudiced by delays in distribution, because unsecured claims do not accrue interest during bankruptcy. *See* 11 U.S.C. § 502(b)(2).

The attempted distinction between solvent and insolvent carriers also fails because it is based on a false premise: that an insolvent carrier is not operating. Urging adoption of this false premise, amicus NITL cites an ICC study and states:

> Insolvent carriers – *precisely because they are no longer operating* – do not require a constant and predictable cash flow to preserve their solvency.

See brief of amicus NITL at 24. To credit this assertion, this Court would have to forget the existence of chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1174. Many insolvent carriers *do* operate under chapter 11, and they

---

[6] A favorite tactic of the ICC and shippers' lobbying groups is to emphasize that a portion of the recoveries of filed rate claims may go to pay the court-approved contingent fee of counsel employed by the carrier's bankruptcy estate. But a bankruptcy estate cannot afford to pay counsel on an hourly basis when the estate is deprived of cash by shippers who wrongfully withhold payment of the filed rate. Further, if the law gives the shipper an incentive to assert a spurious defense to a filed rate claim, then the law also causes an increase: (a) in the employment of defense counsel by shippers to assert such defenses, and (b) the size of the contingent fee demanded by counsel for the estate. These legal costs *by both sides* of filed rate litigation necessarily diminish the recoveries by the carrier, its employees, and other creditors. Strict enforcement of the filed rate doctrine would stop this.

do provide services to the public and jobs and income to their employees. But these same insolvent carriers will fail and liquidate if this Court permits their customers to delay performing their legal duty to pay the filed rate.

Thus, the results of the unfounded rule urged by Petitioners will be highly prejudicial. Further, these prejudicial results are unnecessary. Instead of adopting Petitioners' unfounded rule, the Court should require the shipper to perform its legal duty to pay the filed rate – either to the carrier, or to the court's registry under Fed.R.Civ.P. 67. This rule will deter a shipper from asserting a spurious defense, because the assertion of the defense will not delay payment of the filed rate. This rule also will deter spurious litigation that occurs only if shippers have an incentive to assert rate reasonableness as a defense. This rule will further the "utterly central" filed rate doctrine (*Maislin*, 111 L.Ed.2d at 112), because shippers, carriers and the public will know that shippers are presumptively paying the filed rate. By reason of Fed.R.Civ.P. 67, this rule will not in any way impinge on a shipper's reparations claim. Finally, this rule will prevent unjustified carrier bankruptcies that will result if this Court gives shippers an incentive to stall payment of the filed rate.

II. THE COURT SHOULD NOT REWRITE THE ACT SO AS TO REFER FILED RATE CLAIMS TO AN AGENCY THAT HAS PUBLICLY ANNOUNCED THAT IT: (A) WANTS TO ABOLISH THE FILED RATE DOCTRINE AND (B) WILL NOT SAFEGUARD THE ALLOWANCE OF REASONABLE RATES TO COMMON CARRIERS

Amicus NITL purports to describe at pages 2-6 of its brief the "Regulatory Environment" and the "Nature of the Problem" in this case. But, as described below, the Court may take judicial notice that the "regulatory environment" in reality consists of official opposition by the ICC to enforcement of the filed rate doctrine by carriers. Not surprisingly, this "environment" results in the "problems" of illegal, unfiled rates and of shippers' trying to get filed rate claims improperly referred to ICC so that it can prevent their enforcement.

Congress enacted the filed rate doctrine in 1887 to promote uniform, published transportation rates that would create a more level playing field for competition among businesses using the channels of transportation and that would prevent discrimination against members of the shipping public. *See* S.Rep.No. 46, 49th Cong., 1st Sess. 188, 198 (1886).[7] In addition, the Interstate Commerce Act as amended now expressly states that one of

---

[7] In recommending enactment of the Act, the Senate Select Committee on Interstate Commerce reported:

> [T]he committee believes that every effort possible should be put forth by Congress to secure equality between man and man in respect to the matter of transportation, and that one means to that end would be the prohibition of personal preferences under

the nation's transportation policies is to prevent "destructive competitive practices" by carriers. 49 U.S.C. § 10101(a)(1)(D). This policy furthers another express statutory policy: "fair wages" for employees of carriers. 49 U.S.C. § 10101(a)(1)(F).

Through its Chairman, the ICC has publicly attacked these statutory goals. On March 10, 1992, the Chairman of the ICC assailed these goals in a written speech (*"ICC Chairman's Speech"*) entitled "The Revolution in Motor Carrier Transportation" which was presented to the Raritan Traffic Club, Inc.[8]:

A. **Abolish the filed rate doctrine**: Instead of supporting the filed rate doctrine, the ICC Chairman described the tariff freight undercharge issue as a "furball" that "the ICC has in its throat" because bankruptcy trustees are attempting "to collect monies on filed tariff rates despite the existence of lower negotiated rates that were agreed to by a carrier and a shipper. . . . " *ICC Chairman's Speech* at 3. The Chairman described this Court's decision in *Maislin* as a source of "headaches" (*id.*) and condemned the filed rate doctrine as "a *dinosaur* that should be sent to its reward." *Id.* at 4 (emphasis in original); *see* Appendix A.

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suitable penalties, which should be supplemented by proper provisions for securing publicity of rates.

S.Rep.No. 46, 49th Cong., 1st Sess. 190 (1886).

[8] The Court may take judicial notice of this written and widely publicized speech under Rule 201 of the Federal Rules of Evidence. We do not request the Court to take judicial notice of the truth of the speech, only that the words were spoken by the Chairman of the ICC.

B. **Permit below-cost pricing**: Instead of supporting reasonable rates for carriers, the ICC Chairman supported below-cost rates. The Chairman stated: "Then there are charges of destructive below-cost pricing in the LTL [less-than-truckload] sector. In my view, to the extent that it exists, below-cost pricing in the present competitive environment is essentially a derogatory name for very aggressive – and often very efficient – marketing and yield management." *ICC Chairman's Speech* at 2; *see* Appendix A.

Not surprisingly, both Carolina Motor Express and amicus Transcon Lines went bankrupt in a "regulatory environment" polluted by this attitude and the illegal *Negotiated Rates* policy. Many more carriers will fail if this Court permits improper referral of filed rate and unsubstantiated rate reasonableness claims to an agency which: (1) condemns the filed rate doctrine, and (2) endorses below-cost pricing. The federal judicial system will then have to administer those future carrier bankruptcies while former employees and other creditors endure needless delay and economic hardship.

CONCLUSION

A private shipper should not be permitted to withhold payment of an unambiguous filed rate pending the outcome of ICC hearings on rate reasonableness. The shipper must forthwith pay the filed rate, either to the carrier, or into the registry of the court under Fed.R.Civ.P. 67. The shipper has no right to agency referral of a reparations claim unless the shipper submits evidence to

the court from which the agency could reasonably rule in favor of the shipper. Such evidence does not include evidence of unfiled or otherwise illegal rates.

Respectfully submitted,

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September 1, 1992

APPENDIX A: EXCERPTS OF WRITTEN REMARKS BY HONORABLE EDWARD J. PHILBIN, CHAIRMAN, INTERSTATE COMMERCE COMMISSION, TO THE RARITAN TRAFFIC CLUB, INC. ON TUESDAY, MARCH 10, 1992, AT PINES MANOR RESTAURANT, EDISON, NEW JERSEY

"THE REVOLUTION IN MOTOR CARRIER TRANSPORTATION"

President Bush has repeatedly said that government regulations must be necessary, economically sensible, understandable, responsive to public concern and cost beneficial. I couldn't agree more, and I've done my best since becoming Chairman to have repealed or amended useless and outdated regulations that hamper the business operations of the trucking industry and drain the vitality of our nation's economy. While the Commission has made great progress in this effort, there's a lot left to do.

* * *

If, as suggested recently by Federal Reserve Board Chairman Alan Greenspan (and others), the economy is showing signs of rebound, the industry could well see a financial Renaissance through higher freight rates and improved business.

Despite all the evidence to the contrary, allegations of the failure of deregulation continue: a favorite complaint is that there is now, or soon will be, undue if not dangerous carrier concentration in the LTL sector. (The big guys are swallowing the little guys.) I believe that any

apparent concentration in the LTL sector is the result of the unleashing of pent-up market pressures and *not* the result of a failure of the marketplace. In fact, ICC studies indicate that undue concentration has not occurred.

• • •

Then there are charges of destructive below-cost pricing in the LTL sector. In my view, to the extent that it exists, below-cost pricing in the present competitive environment is essentially a derogatory name for very aggressive – and often very efficient – marketing and yield management.

• • •

The major "furball"[9] the ICC has in its throat is the "undercharge issue" caused by attempts of trustees of bankrupt motor carriers to collect monies based on filed tariff rates despite the existence of lower negotiated rates that were agreed to by a carrier and a shipper, billed by the carrier and paid by the shipper, but never filed in a tariff at the ICC by the carrier. The Commission currently has pending more than *200 such cases*.

• • •

The Commission has addressed this issue to the best of its ability under current law. Last September, we discussed applicable rate reasonableness standards and some techniques available to shippers to show that the higher tariff rates sought may not be lawfully collected. The ICC has also issued decisions in individual cases that

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[9] All emphases and quotation marks are in the text of the Chairman's written speech.

provide relief to specific shippers and also offer guidance to others facing similar claims.

The use of contracts seemed a safe remedy for some of the headaches brought about by the *Maislin* decision. But that course of action has its own perils and ambiguities, which we hope to eliminate soon by clarifying the differing requirements of the law and the ICC regulations. The 37,000 carriers who have contract authority deserve to drive on a highway free of legislative and regulatory potholes.

The *real* solution to the undercharge problem lies in remedial legislation. The Commission has supported two bills introduced by Senator Exon and co-sponsors, neither of which has been enacted. For the future, we can only hope for the best.

The undercharge issue, among other things, casts serious doubt on the continued utility of mandatory filing of motor carrier rate tariffs, given the swift pace at which trucking business is done in today's partially deregulated and fiercely competitive transportation marketplace.

• • •

In short, I've seen no evidence that the current statutory filing requirement serves any beneficial interest. Its only function appears to be the perpetuation of an outdated system through sheer aversion to change. The present "filed rate doctrine" is a *dinosaur* that should be sent to its reward.

• • •

No. 91-1496

Supreme Court, U.S.
FILED
SEP 2 1992
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

IN RE: CAROLINA MOTOR EXPRESS, INC.,
Debtor

PETER C. REITER, *et al.*,
Petitioners,
v.
LANGDON M. COOPER, TRUSTEE FOR
CAROLINA MOTOR EXPRESS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a shipper utilizing the services of a motor common carrier may avoid or delay paying the carrier's filed tariff rate, as required by the Interstate Commerce Act, 49 U.S.C. § 10761, by raising the reasonableness of the filed rate as a defense to collection of that rate.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Affiliates of the International Brotherhood of Teamsters (jointly referred to as "IBT") serve as the collective bargaining representatives for approximately 175,000 workers in the motor carrier industry. In this regard, the IBT negotiates and enters into agreements with motor carrier employers for wages, vacations, severance pay, and other employee benefits. In the event an employer breaches or fails to abide by its agreement, the IBT

may pursue the matter on behalf of the employees it represents.[1]

Following the adoption of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), bankruptcies have plagued the trucking industry. In the past twelve years, 122 unionized carriers have declared bankruptcy. This has resulted in the loss of over 125,000 jobs for IBT members. In addition to losing their jobs, these IBT members are owed millions of dollars in unpaid wages and other benefits by the estates of these bankrupt carriers.

The IBT is not a creditor of Carolina Motor Express, the bankrupt carrier involved in the instant matter. However, in many, if not most, of the other motor carrier bankruptcies, the IBT and the pension funds to which the motor carriers were required to make payments under the IBT members' collective bargaining agreements are the largest unsecured creditors. Because of this creditor status, the IBT has an interest in seeing the estates of bankrupt motor carriers resolved expeditiously, with the trustees of those estates recovering as many lawful assets as possible. The resolution of the issues presented in this case likely will have a major impact upon the administration of other bankruptcy proceedings involving motor carriers and the ability of trustees to secure assets for the benefit of creditors. Accordingly, the IBT has a significant interest in this matter.

As set forth below, the IBT maintains that the decision by the Court of Appeals for Fourth Circuit correctly interpreted the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10101 *et seq.* (Supp. 1992), as mandating that all shippers must pay a motor carirer's filed tariff rate, and that defenses to the collection of a filed tariff rate

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

such as the alleged unreasonableness of the filed rate cannot be raised before the district court.

From a creditor's point of view, several problems would arise if the decision of the Court of Appeals were reversed and shippers could avoid paying a motor carrier's filed tariff rates pending a determination of rate reasonableness by the Interstate Commerce Commission ("ICC"). First, the distribution of assets by the bankruptcy estate, including the payment of wages and pension benefits owed to IBT members, would be delayed. The delay likely would be for an extended period of time, as evidenced by the fact that whereas approximately 200 rate reasonableness matters have been referred by the bankruptcy courts to the ICC, some dating back a year and more, the agency has failed to take action on any of these referred matters. Second, the bankruptcy estates are deprived of interest that could have been earned had those assets been collected in a timely manner. Finally, if the decision of the Court of Appeals is reversed, shippers could avoid their statutory obligation to pay the filed tariff rate merely by asserting a "rate reasonableness" defense, even if that defense has absolutely no merit. This would not only cause IBT members to incur significant injury, but it would be contrary to the basic intent and purpose of the ICA's filed rate doctrine.

For the foregoing reasons, the decision below should be affirmed.

SUMMARY OF ARGUMENT

1. The Interstate Commerce Act requires that a shipper pay a carrier's filed tariff rate without any defense or setoff. Pursuant to the Interstate Commerce Act and this Court's decision in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S. Ct. 2759 (1990), if a shipper claims that a carrier's rate is unreasonable, that shipper may not delay payment of the filed rate by having the claim stayed pending referral to the ICC. Any claim that a tariff rate is unreasonable must be raised in a separate reparations proceeding.

2. The decision of the Court of Appeals for the Fourth Circuit below was consistent with the ICA, and the decisions of other circuits reaching a contrary result were limited to discrete factual situations and do not present a general rule consistent with all applications of the filed rate doctrine.

3. Although not required by the ICA, if a carrier is in bankruptcy, the equitable interest of shippers, the bankruptcy trustee, and creditors of the carrier can be accommodated by following the procedure adopted in *Delta Traffic Service, Inc. v. Georgia-Pacific Corp.*, 936 F.2d 64 (2d Cir. 1992). This procedure allows the filed rate to be paid by the shipper directly to the court (or alternatively to an escrow account maintained by the trustee of the bankruptcy estate), to be held pending a decision by the ICC on a reparations claim based on the alleged unreasonableness of the tariff rate at issue. If this decision is not made within a reasonable period of time, the filed rate is released from escrow to the bankruptcy trustee.

ARGUMENT

I. AN ALLEGATION THAT A CARRIER'S RATE IS UNREASONABLE SHOULD BE RESOLVED BY THE ICC IN THE CONTEXT OF A REPARATIONS ACTION

The issues raised in this appeal extend beyond the controversy between petitioners and respondents. The integrity and basic structure of ICA are at issue here. The Court should not ignore the clear provisions of the law because of an alleged inequity claimed by shippers. To do so would be contrary to the express intent of Congress. It also would not be equitable to creditors, like the IBT.

A. The Filed Rate Doctrine Does Not Permit A Shipper To Use The Defense Of Rate Reasonableness To Prevent Collection Of The Filed Rate

In most motor carrier bankruptcies, there are few assets in the hands of the carrier that can be used to pay debts owed to creditors. In marshalling the assets of the estate, the bankruptcy trustees will attempt to collect debts owed to the carrier, with the most prevalent form of debt owed being undercharges in freight payments. Such undercharges are the difference between the carrier's lawful tariff rate as filed with the ICC and the actual charges billed to and collected from the shipper. As this Court noted only two years ago, a carrier has a strict duty under the ICA to charge and collect the filed tariff rate, and a shipper is liable for any difference between an unfiled "negotiated rate" and the filed tariff rate. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759 (1990).

In *Maislin*, this Court held that the defense of an unreasonable practice by a carrier in violation of 49 U.S.C. § 10701(a) could not be used by a shipper as a defense to bar collection of that carrier's filed rate. *Id.* at 2766-67. In *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107, 110 (4th Cir. 1991), *cert. granted sub nom. Reiter v. Cooper*, 112 S. Ct. 1934 (1992), the Fourth Circuit Court of Appeals held that the defense of an unreasonable rate by a carrier in violation of 49 U.S.C. § 10701(a) also could not be used by a shipper to bar collection of that carrier's filed rate. The Court of Appeals further held that a shipper is required to pay the filed tariff rate, and if it wished to contest the reasonableness of that rate, it must do so in an independent reparation action before the ICC.

The Fourth Circuit's holding clearly is correct. The ICA requires that a carrier "may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff." 49 U.S.C.

§ 10761(a). Although the ICA also requires that the tariff rate be reasonable, 49 U.S.C. § 10701(a), nowhere in the ICA is a shipper given the right to make an offset against payment of the filed tariff rate.[2] Rather, if a shipper wishes to challenge the reasonableness of a tariff rate, it may do so by bringing a reparations action before the ICC. *See* 49 U.S.C. §§ 10708(a)(1), 11701(a), & 11705(a), (b)(1) & (b)(3); *see also Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986).

The requirement that a shipper pay the filed rate and pursue any allegation of rate unreasonableness in a separate reparations action is critical to the ICA's basic policy of preventing discrimination or preference. 49 U.S.C. §§ 10101(a)(1)(D) and 10741(b). As noted by this Court,

> The duty to file rates with the Commission . . . and the obligation to charge only those rates . . . have always been considered essential to preventing price discrimination and stabilizing rates.

Maislin, 110 S. Ct. at 2766 (citations omitted). Absent this requirement, shippers would be treated differently depending on whether any defenses were raised. A shipper

[2] The National Industrial Transportation League and others, as *amici curiae* for petitioners, argue that under a provision of the Bankruptcy Code, 11 U.S.C. § 553, an entity that is both a debtor and a creditor of the bankruptcy estate may offset any debts owed against monies owed to it by the bankrupt. *Brief of Amici* at 28-29. This provision is not applicable in the context of a reparations action, as it is uncertain whether a shipper will be legally entitled to any reparations, or what amount of reparations may be awarded. In order to apply the right of setoff in a bankruptcy matter, there must be definite and ascertainable debts existing between both the debtor and creditor. *In re Rozel Indus., Inc.*, 120 B.R. 944, 949 (Bankr. N.D. Ill. 1990) (§ 553 setoff requires definite liability to have accrued at time bankruptcy petition was filed); B. Weintraub & A. Resnick, *Bankruptcy Law Manual* ¶ 5.10[1] (3rd ed. 1992). The uncertain status of any reparations recovery thus eliminates a shipper's right of setoff under the Bankruptcy Code.

raising a defense of rate reasonableness, for example, could indefinitely delay paying the filed rate, thus having an advantage over those who either paid the filed rate or asserted no such defense. This preferential treatment of certain shippers is specifically prohibited by the ICA, which states that "[a] common carrier . . . may not charge or receive from a person a different compensation . . . for a service rendered, or to be rendered, in transportation the carrier may perform . . . than it charges or receives from another person for performing a like and contemporaneous service." 49 U.S.C. § 10741(a).

Indeed, the issue of whether rate reasonableness must be raised as a defense to an undercharge claim or in a separate reparations action was resolved by *Maislin*. There, this Court held that the use of a defense, including any equitable defense, could not bar the collection of a filed rate. In overturning the ICC's policy in *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C. 2d 623 (1989), the Court thus specifically rejected the ICC's allowance of equitable defenses and noted that "equities" are not relevant to the application of the filed rate requirement of 49 U.S.C. § 10761. *Maislin*, 110 S.Ct. at 2769.[3] Accordingly, peti-

[3] Prior to the *Maislin* decision, several Circuit Courts of Appeal disagreed on whether the ICC's *Negotiated Rates* policy was consistent with ICA. Part of that policy included the use of equitable defenses to collection of a carrier's filed rate. *Maislin*, 110 S. Ct. at 2765, n.8. This Court specifically cited to *Supreme Beef Processors, Inc. v. Yaquinto (In re Caravan Refrigerated Cargo, Inc.)*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3254 (1990), on one hand, and *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990), *Orscheln Bros. Truck Lines v. Zenith Electric Corp.*, 899 F.2d 642 (7th Cir. 1990), *vacated*, 111 S. Ct. 334 (1990), and *West Coast Truck Lines, Inc. v. Weyerhauser Co.*, 893 F.2d 1016 (9th Cir. 1990), *vacated*, 912 F.2d 1130 (9th Cir. 1990), on the other hand, as part of the disagreement between the circuits on the issue of whether a carrier's "unreasonable practices" could be used as a defense to the collection of a carrier's filed rate. As this Court in *Maislin* upheld the Fifth Circuit's reasoning in *Supreme Beef*,

tioner's equitable arguments that the bankruptcy status of a carrier requires a court to ignore strict application to collection of the filed rate are irrelevant.

Although *Maislin* prohibited a shipper from raising equitable defenses to a filed rate claim, a shipper's right to challenge the reasonableness of a tariff rate was not eliminated. Rather, by citing with approval to *Arizona Grocery Co. v. Atchison, T. & S.F.R.*, 284 U.S. 370 (1932), this Court recognized that a shipper could raise that issue in a separate reparations proceeding: "the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation."[4] *Maislin*, 110 S.Ct. at 2767 (quoting *Arizona Grocery*, 284 U.S. at 384-85).

B. The Authority Cited By Petitioners Does Not Require Payment Of A Carrier's Filed Rate To Be Delayed Through Referral To The ICC

Petitioners and their supporting *amici* base their legal argument on two points. First, they claim that the Fourth Circuit's holding was in conflict with the decision of other circuits, and that the other circuits have created a general rule requiring referral to the ICC anytime a rate reasonableness defense is asserted. Second, they claim that a decision of this Court, *United States v. Western Pacific R. Co.*, 357 U.S. 59 (1956), mandates referral of such defenses to the ICC. An analysis of the authority cited by petitioners and their supporting *amici* shows that such arguments are in error. In fact, the authority cited mandates the opposite result.

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that decision thus takes precedence over the other decisions, which were effectively overruled by *Maislin*.

[4] Since the time of the *Arizona Grocery* decision, the ICA has been amended specifically to set forth a procedure under which reparations can be recovered. 49 U.S.C. § 10708(f).

The conflict that petitioners claim to exist between the Fourth Circuit, *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107 (4th Cir. 1991), and the Fifth Circuit, *Supreme Beef Processors, Inc. v. Yaquinto (In re Cavaran Refrigerated Cargo, Inc.)*, 864 F.2d 308 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3254 (1990) ("*Supreme Beef*"), on one hand, and the Eighth Circuit, *Atlantis Express, Inc. v. Standard Transportation Services, Inc.*, 955 F.2d 529 (8th Cir. 1992), and the Second Circuit, *Duffy v. BMC Industries, Inc.*, 938 F.2d 353 (2nd Cir. 1991), on the other hand, is grossly overstated.[5] A review of these and other cases shows that courts that have considered the issue herein presented have recognized, as did the Fourth Circuit, that the filed rate doctrine requires a shipper to pay the filed tariff rate and any issues of rate reasonableness may be raised only in a separate reparations action before the ICC. The decisions of other circuits cited by petitioners have not ruled on the specific issue before the Court,

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[5] Petitioners also cite to several other decisions as part of this "split," none of which should be relied upon as persuasive authority. First, petitioners cite to an unpublished opinion of the Sixth Circuit, *Rebel Motor Freight, Inc. v. ICC*, 933 F.2d 1009 (table) (6th Cir. 1991), *cert. denied*, 112 S. Ct. 617 (1991). Because it is unpublished, *Rebel* cannot be cited with any authority. 6th Cir. R. 10(f). Even in *Rebel*, however, the Sixth Circuit stated that it did not "interpret *Maislin* to require a re-referral to the ICC in every suit by a carrier to collect undercharges. . . . Requiring a ruling from the ICC on reasonableness in every case would weaken the 'strict adherence' to the filed rate doctrine required by *Maislin*." No. 89-3886, 1991 U.S. App. LEXIS 11780, *8 (6th Cir. filed May 28, 1991). Second, petitioners cite to *Delta Traffic Serv., Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990), *Orscheln Bros. Truck Lines v. Zenith Electric Corp.*, 899 F.2d 642 (7th Cir. 1990), *vacated*, 111 S. Ct. 334 (1990), and *West Coast Truck Lines, Inc. v. Weyerhauser Co.*, 893 F.2d 1016 (9th Cir. 1990), *vacated*, 912 F.2d 1130 (9th Cir. 1990), as requiring referral to the ICC. Each of these decisions was either modified or overruled by this Court's decision in *Maislin*. See n. 3 *supra*. Third, petitioners rely upon *Orr v. ICC*, 912 F.2d 119 (6th Cir. 1990), which simply did not address the issue of whether referral to the ICC is required.

but rather have limited their holdings to discrete factual situations and thus do not present a general rule applicable to all motor carrier bankruptcies.

In *Duffy v. BMC Industries, Inc.*, 938 F.2d 353, 354 (2d Cir. 1991), which is cited by petitioners as authority for allowing a shipper to avoid paying the filed tariff rate, the Second Circuit expressly reserved decision on the issue "of whether in all circumstances a shipper's administrative challenge to the reasonableness of a rate must await payment." Stating that the outstanding decisions left it "somewhat uncertain as to whether an unreasonable rate defense may generally be asserted by a private shipper prior to full payment," 938 F.2d at 357, the court in *Duffy* limited its holding to a situation in which a shipper was unable to raise rate reasonableness as a defense before the ICC because the statute of limitations for a reparations action had expired. In that specific situation, the court concluded that the shipper could raise reasonableness as a defense before the district court.[6]

Similarly, in *Atlantis Express, Inc. v. Standard Transportation Services, Inc.*, 955 F.2d 529, 536 (8th Cir. 1992), the Eighth Circuit Court of Appeals also reserved ruling on whether reasonableness was a defense in all undercharge cases; there, the court limited its holding allowing the use of rate reasonableness as a defense only when reparations no longer was a valid remedy for the shipper.

Petitioners also claim that the Fourth Circuit is the only court not to have required payment of the filed rate to be stayed when a rate reasonableness claim is raised. However, two decisions by the Fifth Circuit have addressed the issue of whether a stay was proper in the

[6] The use of *Duffy* as authority for the proposition that payment of the filed tariff rate could be avoided by referral of a rate reasonableness claim to the ICC, as argued by petitioners, was specifically rejected in *Lifschultz Fast Freight, Inc. v. Rainbow Shops, Inc.*, 784 F. Supp. 89, 92-93 (S.D.N.Y. 1992).

same manner as did the Fourth Circuit.[7] In *Southern Pacific Transportation Co. v. San Antonio*, 748 F.2d 266 (5th Cir. 1984), the court held that allowing payment only of the undercharge and not the full tariff rate pending referral to the ICC would "freeze" the rate at a level below the tariff rate, thereby allowing a federal court to unlawfully order that a rate other than the filed rate be paid. The court noted that:

> [t]he Interstate Commerce Act . . . entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the I.C.C.

Id. at 274.[8] A similar result was reached in *Supreme Beef*, where the court held:

> A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed rate doctrine or force the district court to stay proceedings and refer the case to the Commission. Any other decision would constitute legislation on our part; it would create an exception that swallows the doctrine and

[7] There now appears to be an internal split within the Fifth Circuit on this issue. *Supreme Beef* and *Southern Pac. Transp. Co. v. San Antonio*, required payment of the entire filed rate, with any unreasonable rate allegation to be handled in a separate reparations action, while the unpublished decision in *Advance United Expressways, Inc. v. Eastman Kodak Co.*, No. 91-1320 (5th Cir. June 26, 1992), allowed the shipper to delay payment of the filed rate through raising rate reasonableness as a defense to the claim. However, as the Fifth Circuit in *Advance United* did not distinguish (or even discuss) *Southern Pac. Transp. Co. v. San Antonio*, and summarily concluded that *Supreme Beef* is "impractical," the viability of *Advance United* is questionable, particularly as that decision has been appealed to the Fifth Circuit *en banc*.

[8] The Fifth Circuit noted that the ICC, an intervenor in that case, agreed with the court's conclusion that the primary jurisdiction of the agency "would not be impaired by immediate execution of the judgment," thus requiring immediate payment of the filed rate. 748 F.2d at 273, n.14.

> thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact.

864 F.2d at 392 (footnote omitted).[9]

Both the Fourth and Fifth Circuits also noted the problem that is created for the IBT and other creditors if referral to the ICC is permitted—infinite delay in payment of the filed rate. As noted by the Fifth Circuit, a delay in payment of the tariff rate interferes with the filed rate doctrine, and a stay "only threatens to add further, indefinite delays as the plaintiffs await a series of decisions by the I.C.C. 'Whenever' becomes 'never.'" *Southern Pac. Transp. Co. v. San Antonio*, 748 F.2d at 274 (footnote omitted). The court's admonition was indeed prescient. As noted above, notwithstanding the referral of some 200 rate reasonableness matters to the ICC in the past two years, not one has been acted upon.

As a second proposition, petitioners contend that this Court's decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), requires a court to stay all proceedings and allow the ICC to rule upon any rate reasonableness defense before a shipper is required to pay a carrier's filed tariff rate. This argument, however, fails to acknowledge the factual and statutory differences between *Western Pacific* and the case now before the Court.

In *Western Pacific*, three railroads were seeking to recover charges from the federal government for carrying bomb cases filled with napalm gel. The government paid the original freight bills, but upon audit, determined that the wrong tariff rate was applied, and unilaterally de-

[9] This Court has often recognized that a court cannot enjoin a carrier from collecting its filed rates. Unless a rate is suspended by the ICC, a carrier is entitled, and indeed is mandated, to collect its filed rate. A shipper may recover damages if the collected rate is subsequently found unlawful. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 697 (1973); *see also In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

ducted the alleged overcharges from subsequent shipments. The railroads then brought actions to recover the amounts deducted by the government. In contending that the government's actions were improper, the railroads argued that the government could always file a reparations action with the ICC to recover any unreasonable rates paid. This argument was rejected by the Court, holding that under the provisions of 49 U.S.C. § 66,[10] "Congress has relieved the Government from filing such reparations suits by expressly authorizing the General Accounting Office to deduct overpayments from subsequent bills of the carrier." 352 U.S. at 73-74.

Thus, *Western Pacific* does not require a court that is presented with an undercharge claim by the estate of a motor carrier to stay its proceedings and refer issues of rate reasonableness to the ICC, but rather deals with a statute applicable solely to the federal government. This distinctive factual situation is not present here, and any reliance by petitioners upon *Western Pacific* as a basis for avoidance of payment of the filed rate is misplaced.

C. The Avoidance Of Paying The Filed Rate As Urged By Petitioners Will Cause Significant Problems In The Administration Of Bankruptcy Estates

While delay by a shipper in paying the filed rate will always create problems for carriers, particular problems arise in the context of a bankruptcy proceeding. First, aside from the ICA's mandate, the normal commercial incentives for a shipper to promptly pay the filed rate do not exist. If a carrier was still in operation, a shipper likely would seek a quick and reasonable settlement in order to maintain its business relationship with a carrier. If a carrier has declared bankruptcy, as noted by the Fourth Circuit, if referral to the ICC is mandated, the availability of rate reasonableness as a defense "would

[10] This statute is now amended and codified at 31 U.S.C. 3726(b).

provide a strong incentive for shippers routinely to contest the validity of the carrier's filed rate." *Cooper*, 949 F.2d at 110. This incentive exists even if the rate reasonableness defense has no merit.[11]

Furthermore, numerous bankruptcy estates must continue to be administered at a continuing cost to creditors and the wages and pension benefits owed to IBT members remain unpaid while a claim has been referred to the ICC. Because of the continuous delay by the ICC in determining any rate reasonableness referrals, many bankruptcy estates continue to remain open, and creditors of the estates are delayed in being paid.

A stay of collection also would frustrate well-established policies of the bankruptcy laws. Requiring a bankruptcy trustee to forego collection of undercharges while the ICC determines the reasonableness of the rate would unduly delay the trustee's ability to marshal the assets of the estate for distribution to creditors. Bankruptcy law has established a duty on the part of the trustee to maximize the value of the estate for creditors. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985); *In re Rigden*, 795 F.2d 727, 730 (9th Cir. 1986); *In re Johnson*, 55 B.R. 800, 802 (Bankr. E.D. Va. 1985). Trustees thus are obligated to pursue vigorously freight undercharge claims as estate assets available to creditors.

Integral to this duty to maximize the value of the estate is a duty to convert estate assets to cash in an expeditious manner for distribution to creditors. *See, e.g., Rife v. Ruble*, 107 F.2d 84, 86 (6th Cir. 1939); *In re Bell & Beckwith*, 77 B.R. 606, 614 (Bankr. N.D. Ohio 1987), *aff'd*, 87 B.R. 472 (N.D. Ohio 1987); *In re Ferkhauf, Inc.*, 42 B.R. 852, 860 (Bankr. S.D.N.Y. 1984), *aff'd*, 56 B.R. 774 (S.D.N.Y. 1985). *See also Bittner v. Borne Chemical Co.*, 691 F.2d 134, 136-37 (3rd Cir. 1982) (quoting legislative history of the Bankruptcy Code stating that "'the importance of speed and efficiency to creditors and debtors'" in a bankruptcy reorganization "'cannot be overemphasized'"). Indeed, a Chapter 7 trustee's fiduciary duty to "collect and reduce to money" estate property and close the estate "expeditiously" is expressly set forth in the Bankruptcy Code. *See* 11 U.S.C. § 704(1).

[11] The Fourth Circuit also noted that shippers "did not contest [the reasonableness of the filed rate] until they were sued by the trustee." *Cooper*, 949 F.2d at 110. There simply is no excuse for a shipper to wait until it is sued for the filed rate to contest the reasonableness of that rate, as it is uncontested that shippers are charged with knowledge of the filed rate. *Maislin*, 110 S. Ct. at 2766, n.9; *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

Cases referred to the ICC for rate reasonableness determinations remain stalled there unresolved. If permitted to avoid payment to the estate pending these determinations, shippers would frustrate recoveries by creditors in contravention of well-settled policies of bankruptcy law. Timely collection thus serves important bankruptcy principles.

II. THE ALLEGED INEQUITY OF REQUIRING A SHIPPER TO PAY THE FILED RATE IN A BANKRUPTCY SITUATION CAN BE HANDLED BY REQUIRING THE MONIES TO BE HELD IN ESCROW BY THE COURT OR THE TRUSTEE

For the reasons set forth above, the position advanced by the petitioners has no merit as a matter of law. Instead, the arguments for not enforcing the filed rate doctrine when the undercharge claim is made by a trustee of a bankrupt carrier are solely predicated upon equitable concerns. In particular, it is alleged that because a reparations action against a bankrupt carrier, even if successful, may not result in any recovery, requiring a shipper to pay the filed rate in such circumstances may as a practical matter deprive it of the ability to pursue a rate reasonableness action against the carrier. If this perceived inequity were not present, petitioners implic-

itly concede that a separate reparations action would not be improper.

It first is important to note that no showing has been made by petitioners that, in all bankruptcy matters, assets will be unavailable to pay a reparations order. In fact, such assets may be available, particularly if there is a successful Chapter 11 reorganization. Without any evidence to support their position, the alleged inequities claimed by petitioners and their *amici* cannot be properly considered.

In any event, as discussed above, such equitable arguments against application of the filed rate doctrine already have been considered and rejected by this Court in *Maislin*. Whether a shipper could recover reparations awarded by the ICC should not relieve it of its legal obligation to pay the filed rate. Nonetheless, to the extent a court perceives a need "to protect" the interests of a shipper when it appears a carrier would be unlikely to fully satisfy any reparations order if its rates were found to be unreasonable, that need can be accommodated without abrogating the ICA's requirement that carriers collect and shippers pay the filed tariff rate. Indeed, this accommodation already has been applied by the Second Circuit in *Delta Traffic Service, Inc. v. Georgia-Pacific Corp.*, 936 F.2d 64 (2d Cir. 1992).

In *Delta Traffic Service, Inc. v. Georgia-Pacific*, the court ordered the shipper to pay the filed rate, but because the carrier was in bankruptcy, also ordered the district court to hold such payment pending a determination of rate reasonableness by the ICC. This procedure protected the ability of the shipper to recover all or part of its payment in the event its rate reasonableness arguments prevailed. To protect the interests of creditors, however, the court also noted that if the ICC did not resolve the issue of rate reasonableness within a reasonable time, the trustee could petition the district court to release the money. Under this approach, it

would appear that both sides would have an interest in resolving the matter quickly. While certainly not mandated by the ICA, this procedure would address the concerns of all interested parties.[12]

Further, this procedure is consistent with the typical conduct of a bankruptcy case, as bankruptcy courts frequently order the payment of funds into an escrow account where there are disputes among creditors or between creditors and the debtor regarding the disposition of funds. *See, e.g., In re Miranne*, 87 B.R. 897, 903 (E.D. La. 1988) (funds deposited into Bankruptcy Court registry due to competing claims of creditors), *aff'd sub nom. Miranne v. First Fin. Bank*, 861 F.2d 1278 (5th Cir. 1988); *In re Conroe Forge & Mfg. Corp.*, 82 B.R. 781 (Bankr. W.D. Pa. 1988) (proceeds of sale placed in escrow pending resolution of dispute over disposition). Rather than having the monies deposited with the court, the IBT submits that it would be preferable for the monies to be held in escrow by the trustee. This would eliminate any burden upon the court and also would likely enable the trustee to earn interest on the escrow funds which could be used for the benefit of the estate and its creditors.

With this minor modification, the Court should approve the procedure used in *Delta Traffic Service v. Georgia-Pacific* as a means of enabling a lower court to fashion an appropriate equitable procedure when deemed necessary. However, it should be cautioned that this accommodation is not a "cure-all" for every undercharge dispute,

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[12] It is interesting to note that petitioners and their supporting *amici* do not acknowledge that the decision in *Delta Traffic Serv., Inc. v. Georgia-Pacific Corp.* addresses in any way the equitable concerns of the interested parties. By failing to acknowledge the existence of this available remedy, it becomes clear that petitioners wish to avoid paying any money at all, even if their interests are adequately protected by a procedure in which funds are paid into escrow.

but should be applied only in those cases where a shipper makes a *prima facie* showing that a carrier's rate is unreasonable *and* that a carrier would be unable to fully satisfy a reparations order issued in such a proceeding. If both of these factors are not present, the filed rate must be paid in full directly to the bankruptcy estate and no monies should be placed in escrow.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE LLOYD T. WHITAKER AS TRUSTEE FOR THE ESTATE OF OLYMPIA HOLDING CORPORATION f/k/a P*I*E NATIONWIDE, INC. IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1496

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE LLOYD T. WHITAKER AS TRUSTEE FOR THE ESTATE OF OLYMPIA HOLDING CORPORATION f/k/a P*I*E NATIONWIDE, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae is Lloyd T. Whitaker as trustee for the estate of Olympia Holding Corporation f/k/a/ P*I*E Nationwide, Inc. ("*Amicus*" or "Trustee"). He files this brief in support of respondents Landon M. Cooper, trustee for Carolina Motor Express, Inc., *et al.*[1] P*I*E Nation-

[1] All parties have consented to the filing of this Brief pursuant to Rule 37.3 of the Rules of this Court. The parties' letters are filed with the Clerk of the Court.

wide (P*I*E) was a motor common carrier operating pursuant to the authority of the Interstate Commerce Commission ("ICC"). P*I*E filed a Chapter 11 petition under the Bankruptcy Code on October 16, 1990. Its motor carier operations continued, however, first as a debtor-in-possession and then under the auspices of *amicus* Lloyd T. Whitaker, appointed Chapter 11 trustee on December 26, 1990. The case was converted to Chapter 7 on March 11, 1991, and *amicus* was appointed Chapter 7 trustee.

As with most bankrupt motor carriers, the principal asset of the estate of P*I*E is its accounts receivable, consisting primarily of "undercharge" claims against former shipper-customers of P*I*E. These claims arise when shippers fail or refuse to pay the lawful, legal rates P*I*E had published in tariffs duly filed with the ICC. Unlike respondent trustee for Cooper Motor Express, the Trustee for P*I*E estimates the estate's total undercharge claims will, if collected, satisfy P*I*E's secured and unsecured debt. More than 20,000 adversary proceedings are to be filed in the bankruptcy court to collect these undercharge claims.[2] Because the filed rate's alleged unreasonableness is the defense proffered by most shippers sued for refusing to pay the filed rate, often without regard to its legal or factual basis, *amicus* wishes to present his views to assist this Court in resolving the proper application of the filed-rate doctrine.

STATEMENT

The Trustee adopts the statement of the case appearing in opinion of the court of appeals (Pet. App. 2a-5a), as supplemented in the brief of respondents Langdon M.

[2] The main bankruptcy cases are jointly administered in Case Nos. 90-4195-BKC-3P7 and 90-4223-BKC-3P7 in *In re Olympia Holding Corporation a/k/a P*I*E Nationwide, Inc., et al.*, pending in the U.S. Bankruptcy Court in the Middle District of Florida, Jacksonville Division.

Cooper, trustee for Carolina Motor Express, Inc., *et al.* The Trustee does not believe the context in which the rate-reasonableness defense arose in *Cooper* v. *Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107 (4th Cir. 1991) ("*Cooper*"), now before this Court, is fairly representative of undercharge claims in general or of undercharge claims in bankruptcy cases in particular. The Trustee offers the following description of the bankruptcy case in which he serves to provide a broader perspective within which to evaluate the legal issues presented.

1. *Scope of P*I*E's Operations.* When P*I*E filed for protection from creditors on October 16, 1990, it was one of the nation's larger motor carriers. It employed 4500 persons nationwide and had annual operating revenues of $500,000,000. Its customer base was more than 300,000 shippers and receivers of general commodities. Driving its financial predicament were increasing pressures from powerful large shippers, such as those represented by *amici* National Industrial Transportation League, *et al.* ("NITL"), demanding extraordinary trade concessions. They exacted huge, often secret and illegal, discounts off the base rates P*I*E* charged other shippers as a condition to tendering freight P*I*E desperately needed to fill its trucks.

For 2½ months following the filing of its Chapter 11 petition, P*I*E continued motor carrier operations. Despite the protection of the bankruptcy court, its collections of receivables continued to fall faster than operating costs could be reduced. At the end of 1990, P*I*E closed its doors.

2. *The Process of Liquidation.* At termination of operations, P*I*E had not only a considerable secured debt owed to lenders, but its unsecured debt to creditors, including former employees and small trade vendors, exceeded $100,000,000. Unemployed workers are owed $7,800,000 in unpaid wages, accrued leave and vacation

benefits. P*I*E's liability to the union and its non-union employee pension plan and retirement program exceeds $60,000,000. Unpaid state and local taxes are approximately $17,600,000.

As part of the liquidation process of the estate's assets for the benefit of creditors, the Trustee audited the freight bills and invoices P*I*E had issued its shippers to determine whether P*I*E had billed and the shippers had paid all freight charges due and owing under the legal, filed tariffs of P*I*E and the provisions of the Interstate Commerce Act (the "Act"). The Trustee, on behalf of the estate, submitted (and is continuing to submit) balance due bills to shippers found to have failed to pay the legal, lawful filed rates. The balance due bills fall into three distinct categories. Some are for the difference between the duly filed rate and some other lower (but illegal or inapplicable) tariff or unfiled common or contract rate the shipper had originally paid ("undercharges"). Some are for the full amount of the lowest applicable filed rate ("original charges"), and some are for a combination of unpaid undercharges and original charges. Shippers that refuse to pay the balance due bills have found themselves defendants in adversary proceedings the Trustee has initiated in the bankruptcy court, the first of which was filed June 4, 1991.

3. *Moving Towards Successful Conclusion.* The liquidation process is far from complete, but prospects for a successful conclusion appear good. The Trustee's freight bill auditing procedures remain on-going; balance due bills continue to be issued; and hundreds of new adversary proceedings are filed each week. Approximately 10,000 have already been filed in the bankruptcy court,[3] and 10,000 more are expected.

[3] The main bankruptcy case in Jacksonville, FL is the venue of all adversary proceedings. One important case, brought outside the bankruptcy court in the name of P*I*E's principal secured creditor, is pending before U.S. District Court for the Middle District of Florida, Jacksonville Division in Case No. 91-953-Civ-J-16, *Fidelcor Business Credit Corp.* v. *Dillard Department Stores* ("*Dillard*").

The Trustee estimates the total undercharges of the estate exceed $200,000,000. If substantially all these claims are collected or if the current undercharges estimate is low and a smaller portion is collected, these liquidated undercharge assets, together with the collection of other types of claims and the proceeds from the sale of tangible assets,[4] are likely to be sufficient to satisfy fully the debts owed secured and unsecured creditors of P*I*E and to pay the administrative expenses of the estate.

SUMMARY OF ARGUMENT

1. Petitioners attack the very foundation of the Supreme Court's holding in *Maislin*. They would elevate the importance of reasonableness of rates over the filing and collection of published tariff rates. They reverse the "unless and until" condition attached to the obligation to collect the legal filed rate by requiring collection only *after* the ICC rules the challenged rate is reasonable.

2. Petitioners would destroy the statutory scheme for addressing excessive rates. Congress has provided reparations in §§ 11705(b)(3) and 11706(c)(2) of the Act as the exclusive procedure to attack the reasonableness of assessed rates after those rates have become effective and the shipments have moved. Petitioners would have this Court legislate an impermissible exception to the filed-rate doctrine, judicially recognizing the rate-unreasonableness defense to a collections action involving a bankrupt carrier.

3. The filed-rate doctrine exception petitioners would have this Court create specially for the undercharge claims of bankrupt carriers can not be reconciled with the Bankruptcy Code. It is discriminatory on its face in

[4] These non-undercharge revenue sources for the estate include, for example, collection of original charges, recovery of preferences, and sale of real estate, trucks, and terminal properties.

violation of section 553(a) of the Code. It assumes, without foundation, that insolvent carriers can not satisfy debt obligations to their creditors. If implemented, it virtually guarantees the failure of all insolvent carriers' efforts to continue operations under Chapter 11 reorganization. It elevates shippers that withhold payment to insolvent carriers to a superior competitive position vis-à-vis shippers that have paid the legal filed rate as required by law. It creates a shipper benefit or preference in the nature of an offset which the Code prohibits, thus by-passing express Code provisions, 11 U.S.C. §§ 361(3), 362(f), and 363(e), designed specifically to protect the interests of ostensible creditors when warranted.

ARGUMENT

I. THE STATUTORY SCHEME DOES NOT PERMIT AND THE EQUITIES DO NOT WARRANT CARVING OUT A BANKRUPTCY EXCEPTION TO THE FILED-RATE DOCTRINE

This case challenges the filed-rate doctrine, affirmed by this Court two years ago in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S.Ct. 2759 (1990). Contrary to *amici* NITL's self-serving recasting of this doctrine (*see* NITL Br. at 3, 9, 10, 11, and 23), this Court determined that "utterly central" to the Act is the requirement that motor carriers publish and file their rates in tariffs and charge and collect those rates, and no others. *Maislin*, 110 S.Ct. at 2766, 2768-70. That rates be "reasonable" is not the "core," "bedrock," or "cornerstone" of the Act.

Petitioners and their supporting *amici* contend this Court should carve out a special exception to the filed-rate doctrine for shippers asserting rate-reasonableness defenses in those instances involving motor carriers in bankruptcy as undercharge claimants. In that event, according to petitioners and their *amici*, the filed rate need not be collected, and thus the filed-rate doctrine not

enforced, unless and until the ICC subsequently determines in an adversary proceeding that the filed rate is not unreasonable.[5] This special exception is said to be necessary because bankrupt carriers will not, because of their insolvency, make reparations to shippers that have pain the filed rate and subsequently secure an ICC determination the filed rate is unreasonable.

As *amicus*, the Trustee advises the Court that Congress never intended to void or suspend, on "fairness" grounds, application of the filed-rate doctrine to motor carriers in bankruptcy. Congress did not excuse motor carriers in bankruptcy from the Act's mandate to collect their filed rates and to do so within the time frame the statute and ICC regulations have prescribed.[6] Congress did not create an exclusive reparations remedy just for those shippers doing busines with viable, operating carriers.

There are other fundamental reasons why this Court should refuse the invitation of petitioners and their *amici* to graft on to the filed-rate doctrine a bankruptcy exception. As proposed, it is discriminatory in its application, subject to serious abuses, and virtually impossible or impractical to create by judicial fiat. To the extent the exigencies of any specific motor carrier's bankruptcy case may require special protections for shippers challenging

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[5] This theory of pay only *after* an ICC rate-reasonableness determination is exactly the opposite of the principle this Court embraced in *Maislin*. Citing *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 151, 163 (1992), this Court confirmed that in order to prevent discrimination, "*unless and until* suspended or set aside, this [published tariff] rate is made the legal rate for *all* purposes, as between carrier and shipper." (Emphasis added.) 110 S.Ct. at 2765-66. "Unless and until" is a vital concept of prerequisites and timing which petitioners' analysis of the filed-rate doctrine totally reverses.

[6] Sanctioning a delay in payment of the filed rate is tantamount to abetting a violation of the filed-rate doctrine. *Southern Pacific Transp. Co.* v. *City of San Antonio, Tex.*, 278 F.2d 266, 272-74 (5th Cir. 1984).

rate reasonableness in a reparations action, the bankruptcy courts have inherent discretionary power under the Bankruptcy Code and the Federal Rules of Civil Procedure to address those concerns and craft any necessary relief.

A. Congress Provided Reparations As The Exclusive Remedy For Shippers Charged Unreasonable Rates

The statutory scheme for challenging unreasonable rates provides two opportunities to seek relief from the ICC—one prior to the effective date of the rates and the movement of the traffic,[7] and the other subsequent to the rates' effective date and the traffic's movement.

A 1965 amendment to the Act, now 49 U.S.C. §§ 11705 (b)(3) and 11706(c)(2),[8] established for the first time a precise judicial reference procedure for shippers, damaged as a result of paying filed (and effective) rates ultimately found to be unreasonable, to recover reparations from motor carriers. This limited procedure is the only one Congress has made available for post-shipment challenges to assertedly excessive rates. It authorizes the courts to award reparations after the ICC has determined the rates in issue, which plaintiff- shippers have paid, are unreasonable.[9] Congress provided no other procedure.

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[7] Congress, in 49 U.S.C. § 10708, authorized shippers to file petitions with the ICC to suspend and investigate any rate deemed unreasonable *before* the rate becomes effective. In the setting of undercharge claims, § 10708 is not a practical tool.

[8] Act of Sept. 6, 1965, Pub. L. No. 89-170, 79 Stat 651- 652 (1965) (codified as amended at 49 U.S.C. §§ 11705(b) and 11706(c)(2)).

[9] The shipper files a separate reparations action in the district court to recover damages for payment of unreasonable rates, and the court refers the rate-reasonableness issue to the ICC for its initial ruling. The referring court reviews the decision of the ICC and applies or rejects its holding. *See* original codification of the 1965 amendment at 49 U.S.C. § 304a, recodified in 1978 without substantive change, P.L. 95-473, 92 Stat. 1372, to eliminate repetition and to conform to modern usage. *Mohasco Industries, Inc.* v. *Acme Fast Freight, Inc.*, 499 F.2d 1082, 1084-85 (5th Cir. 1974) (the reparations remedy "provide[s] the sole and exclusive remedy for excessive charges").

The reparations section of the statute is Congress's response to the holding of this Court in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959). Four years after Congress amended the Act to provide this narrow remedy, the ICC itself confirmed the narrowness, precision, and exclusivity of the reparations remedy in *Informal Procedures for Determining Reparations*, 335 I.C.C. 403, 407-08, 412, 413 (1969). The ICC's own comprehensive decision interpreting the 1965 amendment and reviewing its legislative hisotry rejects the very approach petitioners and their *amici* urge upon this Court. The decision of the ICC fully supports the decision of the court of appeals in *Cooper*.[10]

B. Petitioners' Suggested Discrimination Against Insolvent Carriers Is Contrary To The Bankruptcy Code

Petitioners and their *amici* attempt to portray bankrupt carriers as a special case warranting judicial recognition of the rate-reasonableness defense to collection of the filed rate, a defense they implicitly concede is not applicable to operating carriers' undercharge claims. This

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[10] The ICC has long enforced a similar pay-now mandate, reaffirmed most recently four years ago in *Payment of Rates & Charges —Penalty for Nonpayment*, 4 I.C.C.2d 340, 345 (1988):

> Of course, a shipper is not precluded from disputing the transportation rate and subsequently obtaining the discount rate. But it must first pay the bill by the date certain and then confer with the carrier about the rate and/or institute litigation for a refund. Stated differently, a shipper may not withhold payment of the discounted rate past the date certain because it disputes the assessed charges and expect to receive the discounted rate. Indeed it is a long-standing tenet of rates law before this agency that "holdouts" or set offs by shippers on future payments are not permitted. (Citations omitted.)

position can not be reconciled with the complex balancing of interests which the constitutionally mandated, congressionally established bankruptcy statute performs. Petitioners fail to consider the implications of their proposed dichotomy for the Bankruptcy Code (the "Code") and the delicate balancing of interests inherent in that statute.

The filing of a case in bankruptcy creates an "estate." 11 U.S.C. § 541. The estate is comprised of property, including "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), and includes "any interest in property that the trustee recovers" under the various sections of the Code. 11 U.S.C. § 541(a)(3). The Code gives the bankruptcy court "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(d). An undercharge action is deemed an asset or property of the estate of a bankrupt carrier. *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1101 (2d Cir. 1990).

The Code is thus fully implicated when petitioners and their *amici* advocate judicial creation of a new filed-rate doctrine corollary: shippers do not have to pay promptly the challenged filed rates of motor carriers in bankruptcy. Petitioners and their *amici* do not contend the courts should condone any delay under the filed-rate doctrine if the carrier publishing the challenged rate is not in bankruptcy. This disparity in treatment is inconsistent with the Code's overriding policy prohibiting discrimination against a debtor under the protection of the Code. 11 U.S.C. § 525(a). Although this Code provision prohibits governmental units, both federal and state, from discriminating against the bankrupt carriers, a judicially mandated exception to the filed-rate doctrine applicable solely to bankrupt carriers is on its face contrary to the clear intent of Congress.

Citing *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984), *amici* attempt to justify this disparity by clinging to the ICC's inherent power "to fashion a remedy beyond its express [statutory] authority in order to further a legitimate statutory purpose . . ." (NITL Br. at 23). Whatever the parameters of this implied power, it does not extend to creation of a "remedy" that conflicts with the express non-discrimination provisions of the Code, the exclusive reparations remedy of the Act, and the filed-rate doctrine itself. *Compare Maislin*, 110 S.Ct. at 2770.

C. Assuming *Arguendo* A Special Exception May Be Created, Bankruptcy Is Not A Justifiable Demarcation

Petitioners and their *amici* urge this Court to establish a bright-line test for carving out the special exception to the filed-rate doctrine—filing a petition in bankruptcy. The mere filing of a bankruptcy petition is not a relevant or rational basis for creating the exception, and no other test is practicable, even assuming any exception is acceptable as a matter of law after *Maislin*.

The liquidation values of motor carriers' estates vary widely. Carolina Motor Express may represent a class of bankrupt carrier whose assets when liquidated are insufficient to satisfy all creditors of the estate. There are, however, other classes of bankrupt motor carriers of which the P*I*E estate appears to be representative where ample assets are available to satisfy all creditors under the priority provisions of the Code. A shipper that successfully pursues its reparations remedy against P*I*E and other similarly situated carriers under the statute does not necessarily receive a rate-reasonableness determination that has little or no practical effect because of the carrier's insolvency as petitioners and their *amici* allege (NITL Br. 16). Petitioners' central pay-later argument ignores this variable.

Not all motor carriers filing for protection under the bankruptcy laws are "defunct" and liquidate, although by definition they may be insolvent. P*I*E, while in Chapter 11, continued its trucking operations for some 2½ months before finally succumbing to the pressures of diminished revenues resulting from extreme difficulties in collecting its accounts receivables. Other motor carriers have been able to survive following their Chapter 11 petitions, performing viable operations while in reorganization and emerging from bankruptcy.[11] If the mere filing of the bankruptcy petition could trigger the availability of the rate-reasonableness defense, non-liquidating Chapter 11 carriers would be doomed to failure as they faced collection problems not encountered by their competitors. Shippers would have added incentive to stop making payments of transportation charges to carriers operating in Chapter 11 reorganization. Instead, they would simply contest all existing rates as unreasonably high, without regard to the merits of this assertion.[12] The drain on the carriers' cash flow at a time when credit is the tightest would place them at a significant, probably even fatal, competitive disadvantage. The sheer cost to the debtor-carrier to litigate these resulting claims and bogus "rate-reasonableness" defenses, as well as the prospects of an uncertain result many years later, may dictate accepting compromise settlements and thus reduced revenues, further exacerbating cash flow shrinkage.

P*I*E is itself the victim of massive shipper refusals to pay transportation charges for services P*I*E rendered while operating in Chapter 11 reorganization. For example, in *Dillard*, *supra* at n.3, plaintiff seeks to collect more than one million dollars in undercharges and orig-

[11] Most of today's larger commercial airlines represent such success stories.

[12] This is no mere theoretical possibility. See discussion of shippers Dillard and Younkers below. The Fourth Circuit correctly predicted this behavior. *Cooper*, 949 F.2d at 110.

inal charges for thousands of shipments P*I*E had transported for Dillard post-petition on which Dillard simply declined to make any payments (App. "A" at 1a). Dillard's unreasonable-rate defense persuaded the court to hold the entire case in abeyance and refer the issue to the ICC (App. "A" at 15a).[13] P*I*E's estate will not see any recovery for many years, if ever, based on the ICC's current disgraceful record.[14] More importantly, Dillard's competitors have had to pay full applicable filed rates for comparable transportation services and have had to pay them within the ICC's established credit period. To suggest shippers should be permitted to postpone filed-rate payments for years simply by asserting rate-reasonableness defenses because discrimination possibilities suddenly evaporate in a bankruptcy context is to defy reality.

Unlike the court in *Dillard*, the court in *Lloyd T. Whitaker as Trustee for Olympia Holding Corp. f/k/a P*I*E Nationwide, Inc.* v. *Younkers, Inc.*, No. 91-448, 1992 WL 136415 (Bankr. M.D. Fla. June 15, 1992), refused to refer Younkers' rate-reasonableness defense to the ICC when the shipper sought to block collection of the full filed rate.[15] Younkers, like Dillard, had elected not to

[13] *Amici* NITL (NITL Br. at n.6) is simply wrong on this point.

[14] The ICC has received approximately 200 court referrals of the rate-reasonableness issue since this Court's decision in *Maislin* more than two years ago. The ICC has not made a single rate-reasonableness determination in any one of these cases, and there is no prospect it intends to do so. *See* Affidavit of Don H. Norman, in evidence in *Lloyd T. Whitaker, Trustee for Olympia Holding Corp., et al. v. ICC*, No. 92-2747, 6 Fla. L.W. B147 (June 8, 1992) (App. "B" at 16a-17a).

[15] The *Younkers* court followed the holding of the Fourth Circuit in *Cooper*:

> The [Act] provides a procedure through which a shipper may challenge a filed rate and recover "reparations" for excessive amounts. The scheme does not provide for the use of the right to reparations as a defense. The sole and exclusive remedy

pay P*I*E anything for transportation services P*I*E rendered post-petition, forcing the Trustee to initiate an adversary proceeding to collect.

Petitioners and their *amici* argue that no harm occurs when shippers are excused indefinitely from paying the filed rate of a bankrupt carrier until the ICC acts on their rate-reasonableness defense. They ignore the advantage these shippers enjoy vis-à-vis their competitors that have obeyed the law, paying the applicable filed rates within the time frame prescribed in the carrier's tariffs and any relevant ICC credit period. If these competitors elect to challenge the reasonableness of the bankrupt carrier's rates post-payment and they prevail in their statutory reparations action, they become unsecured creditors of the estate. The self-help shippers that *amici* NITL represent do not have to endure this financial burden and risk as long as they couple their unilateral decisions not to pay with a rate-unreasonableness defense when sued.

Petitioners and their *amici* also fail to recognize the vagaries of the marketplace as hundreds, perhaps even thousands, of shippers file for bankruptcy protection themselves in the intervening years between the carrier's bankruptcy petition and the ICC's decision on the reasonableness of the rates. They thus may escape their payment obligations altogether.[16]

The bright-line test of petitioners and their *amici* can not accommodate the multifaceted, often subtle nuances of the market place. Rather than tampering with the filed-rate doctrine, *amicus* Trustee respectfully suggests the

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provided is a post-payment challenge to the rate reasonableness accompanied by a request for reparations. (Citations omitted.) (App. "C" at 36a).

[16] The Trustee is discovering that hundreds of P*I*E's former customers to which balance-due bills have been submitted are no longer around. They have filed for bankruptcy protection or simply gone out of business, leaving unpaid transportation charges virtually uncollectible.

bankruptcy courts, with their intimate familiarity with the unique circumstances surrounding each bankruptcy case and each bankruptcy proceeding, are and should remain the proper forum to address any special protections to which an account-debtor may be entitled under the Code and the laws of interstate commerce.

II. THE BANKRUPTCY COURT HAS INHERENT POWER TO FASHION REMEDIES, CONSISTENT WITH THE FILED-RATE DOCTRINE, TO PROTECT ACCOUNT-DEBTORS

A. Code Setoff Provisions Are Inapplicable And Support *Cooper*'s Pay-Now Holding

Amici NITL cite the Code as support for their right to protect themselves by insisting on a rate-reasonableness determination prior to payment of the filed rate. They analogize their "right" to withhold rate payments to an alleged "right" under the Code, 11 U.S.C. § 553(a), to setoffs and recoupment (NITL Br. at 28). Based on this analogy, they argue a shipper that is both a creditor and debtor is not required, under the bankruptcy laws, to pay first and collect later, but "is entitled to set off the debt it owes against the debt it is owed . . . ." *Id.*

Recoupment is an equitable defense or remedy this Court specifically rejected in *Maislin* as unavailable in the filed-rate context, and bankruptcy does not create a right of setoff. Section 553(a) of the Code does not create that right, but merely preserves whatever right may exist under substantive law outside the bankruptcy context, and only then if all the conditions of section 553(a) are met and the court, in its sound discretion, grants the setoff. *Goodrich Employees Federal Credit Union* v. *Patterson*, 967 F.2d 505 (11th Cir. 1992); *In re Harbaugh*, 99 B.R. 671, 675 (Bankr. W.D. Pa. 1989), and cases cited therein.

In *Goodrich*, the 11th Circuit concluded the Credit Union's self-help action, freezing the debtors' account in order to protect its asserted right of setoff, violated the

automatic stay provisions of the Code, 11 U.S.C. § 362(a). The *Goodrich* court specifically rejected the same disappearance-of-assets rationale petitioners and *amici* proffer here. The Credit Union argued it was entitled to withhold funds to which the debtors were otherwise entitled because, if paid over, the Credit Union would be left with neither security for its claim nor other lawful means to protect its security interest.

First, the 11th Circuit determined the Credit Union wrongly presupposed it had a right of setoff when in fact none existed under state law. Likewise, NITL incorrectly presupposes a shipper's right to setoff against payment of the applicable filed rate whereas the Act provides for no such right,[17] and the courts have ruled none exists in the bankruptcy setting because of the preeminence of the filed-rate doctrine. *In re Penn Central Transportation Co.*, 477 F.2d 841, 844-45 (3rd Cir. 1973), *aff'd sub nom.* 414 U.S. 885 (1973).

Second, the 11th Circuit in *Goodrich* determined the Credit Union wrongly presupposed it had no other means to protect its asserted interest. Agreeing that, under the facts of that bankruptcy proceeding, payment of the funds owed to the debtors would leave the Credit Union with "an empty right" if the Credit Union's offset was subsequently determined to be valid, the court of appeals nevertheless refused to condone the creditor's actions. Instead, it chastised the Credit Union for failing to avail itself of alternatives available under the Code to protect the Credit Union from the risk of unavailability of funds to satisfy its later-determined valid right of setoff. Likewise, as discussed below, petitioners and their *amici* have several alternative means of protecting their asserted reparations rights without unilaterally withholding filed-rate payments due trustees. Petitioners fail to address those alternatives.

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[17] This Court construed the Act as condemning any offset against the filed rate as a form of an illegal rebate, warranting severe civil penalties. *Maislin*, n.2.

B. Protections Consistent With The Filed-Rate Doctrine Abound: Petitioners Ignore Them

Congress, in enacting section 105 of the Code, 11 U.S.C. § 105(a), gave the bankruptcy courts broad equitable powers to modify their own orders and to craft remedial orders so as to further substantive provisions of the Code as long as such exercise is not inconsistent with the Code or applicable law. *In re Morristown & Erie Ry., Inc.*, 885 F.2d 98 (3rd Cir. 1989).

The bankruptcy court, with day-to-day supervision of the motor carrier's bankruptcy case, is well positioned to assess the size of the creditor's total claims, the value of the estate's assets, and the progress of the liquidation. Each case is different. If convinced a shipper or a group of shippers requires special protection because of the condition of the estate's collection efforts and given the nature of their claims against the estate and the estate's claims against that shipper or shipper group, the bankruptcy court may attach appropriate conditions to the payment of the filed rate. If necessary, it could, for example, require the trustee to take steps to preserve shipper payments of the filed rate, when received, pending final outcome of any reparations action the shipper initiates. *Compare In Re Eastern Freight Ways, Inc.*, 577 F.2d 175, 181-82 (2d Cir. 1978). It also could require the payments be placed directly into a special court registry or fund pending a decision from the ICC. *See Delta Traffic Service, Inc.* v. *Georgia-Pacific Corp.*, 936 F.2d 64 (2d Cir. 1991). In finding an automatic-stay violation in *Goodrich*, the court of appeals relied on the asserted creditor's failed use of a similar alternative to protect itself, citing sections 361(3), 362(f), and 363(e) of the Code as sources of the bankruptcy court's broad powers. None of these alternatives would, on its face, conflict with the filed-rate doctrine, but would be consistent with it. Petitioners and their *amici* fail to mention them.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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September 2, 1992 * Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 91-953-Civ-J-16

FIDELCOR BUSINESS CREDIT CORPORATION,
Plaintiff,

v.

DILLARD DEPARTMENT STORES, INC.,
Defendant.

ORDER

[Filed July 30, 1992]

This cause is before the Court on Plaintiff's motion for preliminary injunction (docket no. 35); Defendant Dillard Department Stores, Inc.'s (hereinafter "Dillard") motion for stay and referral to the Interstate Commerce Commission (hereinafter "ICC" or "Commission") (docket no. 46); Plaintiff's motion for order permitting Plaintiff to file a reply (docket no. 60); and, Dillard's motion for leave to file reply (docket no. 61). Timely responses have been filed.

I. Background and Procedural History

The facts as alleged by Plaintiff are as follows. P*I*E Nationwide, Inc., a now-bankrupt motor common carrier, transported thousands of shipments for Dillard in 1989 and 1990. Many of these shipments were transported pursuant to a P*I*E tariff on file at the Commission which required payment within sixty days as a condition to receiving a large discount. However, Dillard refused to pay for these shipments.

According to Plaintiff, within two weeks of the end of the sixty-day period for payment P*I*E rebilled Dillard

separately and individually for each of those shipments at the full undiscounted class rates. Again, Dillard failed to pay.

The remainder of Dillard's shipments in 1989 and 1990 were transported at a fifty-seven percent discount and paid on time by Diliard. However, Plaintiff later discovered that P*I*E's tariffs contained only a forty-seven percent discount for Dillard. Plaintiff then rebilled Dillard for the ten percent difference on these shipments, which Dillard refused to pay.

On October 16, 1990, Olympia Holding Corporation, formerly P*I*E Nationwide, Inc., filed a petition for relief under Chapter 11 of the Bankruptcy Code. As of the petition date, Olympia was principally engaged in the business of motor carrier transportation for its customers, and had pledged its accounts receivable to Plaintiff as security for more than $40 million in indebtedness to Plaintiff pursuant to certain loan agreements. Plaintiff was Olympia's principal pre-petition lender, and secured all pre-petition advances by liens and security interests on the assets of Olympia, including but not limited to P*I*E's accounts receivable.

On December 15, 1991, Olympia announced its decision to terminate its operations. Olympia terminated its operations in mid-January, 1991. Olympia's bankruptcy case was promptly converted from a case under Chapter 11 to a case under Chapter 7. As of January 30, 1991, Olympia owed Plaintiff in excess of $37 million pursuant to the aforementioned loan agreements. On March 24, 1991, the Bankruptcy Court granted Plaintiff relief from the automatic stay imposed by 11 U.S.C. § 362(a) and vacated the automatic stay to permit Plaintiff to collect freight charges from former customers of P*I*E (including Defendant Dillard).

Plaintiff filed this case on November 1, 1991, to collect allegedly unpaid freight charges from Defendant in ac-

cordance with applicable tariffs on file with the Commission. On February 19, 1992, Dillard filed a Complaint and Petition for Declaratory Order before the Commission seeking a disposition of issues raised by Plaintiff's Complaint in this case and by Defendant's answer and affirmative defenses. Specifically, Dillard asked the Commission to determine whether Fidelcor's attempt to collect loss of discount penalties violates the Commission's Credit Rules and/or is an unreasonable practice under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (hereinafter "Act"), and whether the higher rates sought to be collected by forfeiting the discounts are unjust and unreasonable under the Act. On April 1, 1992, the Commission instituted an investigation and ordered Plaintiff to show cause why a cease and desist order should not be issued prohibiting Plaintiff from collecting or attempting to collect more than previously billed discount rates on file with the Commission in violation of the Act and the rules and regulations promulgated thereunder. *See* ICC Decision, No. MC-C-30197 (April 1, 1992). Dillard's Petition is currently pending before the Commission.

Plaintiff's motion for preliminary injunction requests this Court to enjoin Dillard from further prosecuting or otherwise pursuing its Complaint and Petition for Declaratory Order filed before the Commission. Defendant's motion for stay and referral requests this Court to stay this case and refer the issues raised by Defendant's affirmative defenses under the Act to the Commission for determination. Specifically, Defendant requests that the following issues be referred: (1) whether Plaintiff's attempt to collect loss of discount forfeitures as penalties for late payment of freight bills violates the Commission's Credit Rules, 49 C.F.R. § 1320, and/or is an unreasonable practice under the Act; and, (2) whether the higher rates claimed, if applicable, are unreasonable under the Act.

II. Discussion

A.

This case involves two important concepts in the law regulating motor carriers—the doctrine of primary jurisdiction and the filed rate doctrine. The interaction of these two concepts, in tandem with the bankrupt status of a defunct motor carrier, will define the procedural framework by which this case will operate.

The statutory basis for the filed rate doctrine is set forth in the Interstate Commerce Act, which requires a motor common carrier to publish its rates in a tariff filed with the Commission. 49 U.S.C. § 10762. The Act imposes an obligation on the carrier to charge only those rates on file, *id.* § 10761, and prohibits a carrier from subjecting any shipper to unreasonable discrimination. *Id.* § 10741. Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the carrier or shipper. See *id.* §§ 11902-11904.

The classic judicial statement of the filed rate doctrine is set forth in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 35 S. Ct. 494 (1915). In *Maxwell*, the Court stated:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Id. 237 U.S. at 97, 35 S. Ct. at 495.

This strict rule has been necessary to prevent carriers from intentionally misquoting rates to certain shippers as a means of offering discounts to favored shippers, thereby discriminating against less important shippers who are required to pay the higher filed rates. *See Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1230-31 (7th Cir. 1982). The United States Supreme Court recently relied on the filed rate doctrine to invalidate the Commission's policy of allowing shippers to maintain an "unreasonable practice" defense to a suit by a carrier to collect unpaid freight charges arising out of negotiated (but unfiled) rates. *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

The main exception to the filed rate doctrine is that "the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 110 S. Ct. at 2767; *see Maxwell*, 237 U.S. at 97, 35 S. Ct. at 495 (stating that the filed rate is the legal rate "unless it is found by the Commission to be unreasonable"). The Act gives shippers the right of reparations against carriers that charge unreasonable rates. 49 U.S.C. § 11705(b)(3) (stating that a "common carrier providing transportation or service . . . is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle."). A shipper may contest the reasonableness of a filed rate before or after the filing of the carrier's undercharge suit. *Id.* § 10708(a)(1) (stating that the Commission "may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately; on its own initiative or on application of an interested party when . . . a new individual or joint rate . . . is filed with Commission by a common carrier . . .").

B.

The doctrine of "primary jurisdiction" requires that:

> "issues of transportation policy which ought to be considered by the Commission in the interests of a

> uniform and expert administration of the regulatory scheme laid down the by Act" be submitted initially to the Commission for determination. Therefore, a district court trying a case under the Interstate Commerce Act must, if presented with such an issue, stay its proceedings and refer the case to the Commission.

City of New Orleans v. Southern Scrap Material, 704 F.2d 755, 758 (5th Cir. 1983) (*quoting ICC v. Atlantic Coast R.*, 383 U.S. 576, 579 (1966)). It is beyond dispute that the Commission has primary jurisdiction to determine whether filed rates are reasonable. *See Atlantis Express, Inc. v. Standard Transp. Services, Inc.*, 955 F.2d 529, 537 (8th Cir. 1992) (*citing United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 62-70, 77 S. Ct. 161, 164-68 (1956)). In addition, the Eleventh Circuit has held that the Commission has primary jurisdiction to determine whether a carrier *practice* is unreasonable under the Act, *see Seaboard System R.R., Inc. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986), "particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency . . . [and calls for] a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-05, 96 S. Ct. 1978, 1987 (1976). Moreover, when questions of construction and reasonableness of a tariff are "so intertwined that the same factors are determinative of both issues, then it is the Commission which must first pass on them." *Coca-Cola Co. v. Atchison, T. & S. Ry. Co.*, 608 F.2d 213, 220 (5th Cir. 1979) (*quoting Western Pac. R.R*, 352 US. at 69, 77 S.Ct. at 168).

C.

Both parties agree that issues of rate reasonableness are within the Commission's primary jurisdiction. However, Plaintiff contends that the filed rate doctrine requires that Defendant first pay the filed rates and then sue in district court for reparations, *see* 49 U.S.C. § 11705(b)(3), at which time the issue of rate reasonableness would be referred to the Commission. In contrast, Defendant contends that rate reasonableness may be raised as an affirmative defense to this lawsuit, and that the issue of rate reasonableness should be promptly referred to the Commission for resolution. With regard to the issue of whether Plaintiff's attempt to collect loss of discount penalties violates the Commission's credit rules or constitutes an unreasonable practice. Defendant contends that this issue should also be referred to the Commission, while Plaintiff contends that this issue is not referable.

The first question this Court must answer is whether any of these issues may be referred to the Commission at this time, or whether these issues may be referred to the Commission only after Dillard pays the filed rates and sues for reparations. The Supreme Court, in a case involving the United States as shipper, has held that rate unreasonableness may be raised as a defense in an action to collect rail freight undercharges. *Western Pacific*, 352 U.S. at 71-74, 77 S. Ct. at 168-71. However, because that case involved a unique factual situation with the United States as a shipper, some courts have been hesitant to extend the *Western Pacific* holding to situations involving private shippers. *See, e.g., Atlantis Express*, 955 F.2d at 537 n.14.

The recent decision by the Supreme Court in *Maislin* also provided clues as to the proper course of action. In *Maislin*, the Court reversed the Commission's negotiated rates policy and stated that:

> The ICC did not determine whether the tariff rates were unreasonable even though respondent requested such a determination. We therefore must assume, for purposes of our decision today, that the rates

were reasonable. *The issue of the reasonableness of the tariff rates is open for exploration on remand.*

110 S. Ct. at 2767 n.10 (emphasis added).

Several appellate courts have interpreted this footnote to approve of referral to the Commission where a shipper raises a rate unreasonableness defense to a collection suit. *See, e.g., Advance United Expressways, Inc. v. Eastman Kodak Co.*, No. 91-1320, slip op. at 10 (5th Cir. June 26, 1992). The *Maislin* Court also noted without disapproval the district court's referral of the matter to the Commission. *Maislin*, 110 S. Ct. at 2760.

The circuit courts are split on whether a shipper can raise the unreasonableness of filed rates as a defense in an action to collect undercharges and obtain immediate referral of the issue to the Commission prior to paying the filed rates. The vast majority of circuits have held that rate unreasonableness is a valid defense and that, as a general rule, stay and referral to the Commission is appropriate. *See Advance United*, slip. op. at 10 (5th Cir. 1992); *Atlantis Express*, 955 F.2d at 536 (holding that rate unreasonableness is a valid defense where the parties agreed to a negotiated rate and the shipper no longer has an adequate reparations remedy due to the carrier's bankruptcy); *Duffy v. BMC Indus.*, 938 F.2d 353, 357 (2d Cir. 1991) (allowing shipper to assert an unreasonableness defense when two-year statute of limitations on reparations action had expired); *Branch Motor Express Co. v. Caloric Corp.*, No. 89-1130, slip op. at 3-4 [914 F.2d 241 (Table)] (3d Cir. Aug. 14, 1990) (mem.) (recognizing an unreasonableness defense, but denying referral where the shipper failed to introduce any evidence of unreasonableness); *Delta Traffic Serv. v. Transtop, Inc.*, 902 F.2d 101, 104-06 (1st Cir. 1990); *Western Transp. Co.*, 682 F.2d at 1231-32 (7th Cir. 1982). Only one circuit has held that shippers must pay the freight undercharges and then challenge the reasonableness of the filed rates in a separate reparations action before the

Commission. *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express, Inc.)*, 949 F.2d 107, 110 (4th Cir. 1991); *see also Supreme Beef Processors, Inc. v. Yaquinto (In re Caravan Refrig. Cargo, Inc.)*, 864 F.2d 388 (5th Cir. 1989); *but see Advance United, supra* (effectively overruling *Supreme Beef*). In *Cooper*, the Fourth Circuit reasoned that referral to the Commission of undercharge cases involving rate unreasonableness defenses would frustrate the operation of the filed rate doctrine by providing "a strong incentive for shippers routinely to contest the validity of the carrier's rates in order to delay paying the carrier's filed rate." *Cooper*, 949 F.2d at 110. The Supreme Court has granted certiorari and will review the *Cooper* decision. *Reiter v. Cooper*, 112 S. Ct. 1934 (1992).

This Court agrees with the majority view and holds that rate unreasonableness is a valid defense which may be raised by a shipper in a carrier's suit for undercharges. Furthermore, this issue may be referred to the Commission in appropriate circumstances. This result is fully consistent with the language and structure of the Act. Although the Act provides a reparations remedy to shippers who have already paid the filed rate, nothing in the Act expressly forbids the unreasonableness defense asserted here. Moreover, the plain language of 49 U.S.C. § 10708(a)(1) authorizes a shipper to contest the reasonableness of a filed rate at any time. *Id.* (stating that the Commission "may begin a proceeding to determine the lawfulness of a proposed rate . . . on application of an interested party" when a new rate is filed); *see Cooper*, 949 F.2d at 110.

The Court also finds that referral of the rate reasonableness issue to the Commission is not inconsistent with the filed rate doctrine. The overriding purpose of the doctrine is to prevent a carrier from engaging in price discrimination among shippers. *See Maislin*, 110 S. Ct. at 2768. It is difficult to see how this purpose is frus-

trated by stay and referral where the carrier is bankrupt, since there is no possibility of a defunct carrier engaging in illegal price discrimination among shippers while the Commission determines the referred issues. *See Atlantis Express*, 955 F.2d at 536. The Commission itself has agreed with this analysis in a recent policy statement and has concluded that rate unreasonableness is a defense where the carrier is bankrupt. *See* ICC, Ex Parte No. MC-177 (Sub-No. 2), *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 68 (Aug. 15, 1991) (stating that "[i]mmediate payment is not needed to achieve the goals of the filed rate doctrine. . . . There is no possibility of a defunct carrier unlawfully discriminating for or against any shippers while the rate reasonableness challenge is being resolved.").

Finally, it is highly important that this case involves a bankrupt carrier. Because of P*I*E's bankruptcy, a shipper who is forced to pay now and sue for reparations later will be left without an adequate reparations remedy. *See Atlantis Express*, 955 F.2d at 536. Perhaps when the collection suit is brought by a viable carrier, the proper course would be to require the shipper to pay the filed rate and then sue for reparations. However, when the carrier is bankrupt, denying a shipper's request to refer a rate reasonableness defense to the Commission would essentially deprive that shipper of the reparations remedy afforded by the Act, a result that is not compelled by the Act or by judicial formulations of the filed rate doctrine. *See Atlantis Express*, 955 F.2d at 536.

D.

Having decided that the filed rate doctrine does not bar referral to the Commission in appropriate circumstances, the Court must now determine whether Dillard has raised issues which require referral. Unquestionably, Dillard's defense of rate unreasonableness is an issue within the

Commission's primary jurisdiction which requires referral. However, a shipper must make a threshold showing that the Commission could find the filed rates unreasonable; a mere conclusory assertion of unreasonableness is insufficient. *See id.* at 537. Relevant factors in determining reasonableness include: (1) a comparison of the challenged rates with other competitors' rates for the same traffic; (2) whether the rates paid by the shipper were competitive; and, (3) whether the filed rates sought to be imposed were above prevailing market rates. *See id.*

In this case, Dillard has alleged (by the affidavit of the manager of Dillard's freight payment department, Mr. Tim Walker) that it received discounted rates from other carriers during the relevant period of up to sixty percent, in comparison to the fifty-seven percent discount originally billed by P*I*E. In addition, Dillard alleges that the undiscounted rates are grossly unreasonable in that such rates would have given P*I*E an excessive profit margin of seven times the normal operating margin in the motor carrier industry, a retun on equity of 259%. The Cout finds that Dillard has made a sufficient threshold showing of rate unreasonableness to justify referral of this issue to the Commission.

Dillard also has requested this Court to refer the unreasonable practice and credit regulations issues to the Commission. By affidavit of Tim Walker, Dillard alleges that Plaintiff failed to timely rebill Dillard for loss of discount forfeitures within the ninety-day period within which such forfeitures must be asserted under the Commission's Credit Rules, 49 C.F.R. § 1320. Rather than billing Dillard within the ninety-day period, Plaintiff allegedly sent Dillard a revised freight bill for the forfeited amounts approximately one year after the shipments moved. Dillard also alleges that the loss of discount forfeiture is being claimed in the aggregate as to a large number of bills which had been issued over a period of

time, also in violation of the Credit Rules. The Court finds that Dillard has made a sufficient threshold showing that Plaintiff has violated the Commission's Credit Rules and has engaged in an unreasonable practice prohibited by the Act. Accordingly, these issues will be referred to the Commission, since they involve somewhat technical questions of fact and call for a determination that could be facilitated by the Commission's informed evaluation of the economics and practices of the motor common carrier industry. *Cf. Western Pacific*, 352 U.S. at 65 (stating that primary jurisdiction of an agency should be recognized when necessary to promote "uniform and expert administration of the regulatory scheme").

The Court's findings on whether Dillard has made sufficient threshold showings of rate unreasonableness, violation of Credit Rules, and unreasonable practices, are supported by the Commission's recent action in response to the petition filed by Dillard. Specifically, the Commission has found reason to order Plaintiff to show cause why a cease and desist order should not be issued prohibiting Plaintiff from collecting or attempting to collect more than previously billed discount rates on file with the Commission. *See* ICC Decision, No. MC-C-30197 (April 1, 1992).

Plaintiff cites the case of *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S. Ct. 1815 (1982), for the proposition that a carrier's non-compliance with the Commission's credit regulations is not a defense to a carrier's claim for payment of freight charges. However, *Commercial Metals* does not speak to the issue of whether a credit regulations issue may be referred to the Commission. Rather, *Commercial Metals* merely refused to permit a judicially-created affirmative defense based on violations of the Commission's credit rules. *See id.* 456 U.S. at 345-48, 102 S. Ct. at 1821-23 (noting that the Commission's silence and "public policy concerns disfavor judicial implication of affirmative de-

fenses based on carrier violations of the Commission's credit regulations."). The *Commercial Metals* Court left open the possibility that the Commission itself, in regulating this "highly technical field," *see id.* 456 U.S. at 350 n.11, 102 S. Ct. at 1824, could provide such an affirmative defense in the future. *See id.* 456 U.S. at 351, 102 S. Ct. at 1825 (stating that the "remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper.").

Referral of the unreasonable practice and credit violations issues to the Commission is also consistent with the views of the Third and Fifth Circuits, which have approved of the referral of similar issues to the Commission. See *Delta Traffic Service, Inc. v. Mennen Co.*, 919 F.2d 134 (1990) (unpublished decision); *Delta Traffic Service v. ADM of Mississippi*, 954 F.2d 721 (5th Cir. 1992) (unpublished decision). Furthermore, referral of these issues will not violate the filed rate doctrine, since there is no possibility of discrimination by a bankrupt carrier. Moreover, considerations of judicial and administrative efficiency strongly suggest that one forum should initially decide these issues. *See Advance United*, slip op. at 14 (stating that, where a court refers a rate unreasonableness issue to the Commission, interests of judicial economy militate in favor of referral of all issues relating to a carrier's collection suit). Because the Commission will be deciding Dillard's claim of rate unreasonableness, it simply makes sense to allow the Commission to also consider the other related issues raised by Dillard.

As for Plaintiff's motion for preliminary injunction, the Court will deny relief in all respects. In order to justify a preliminary injunction, Plaintiff must establish the following four factors: (1) a substantial likelihood of success on the merits; (2) a showing that Plaintiff will suffer irreparable injury if an injunction does not issue; (3) proof that the threatened injury to Plaintiff outweighs any harm that might result to Defendant; and,

(4) a showing that the public interest will not be disserved by a preliminary injunction. *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of America v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990). The Court finds that Plaintiff will not be irreparably harmed by referral of the rate issues to the Commission, and by stay of this case pending a decision by the Commission. Also, given that Plaintiff's position on the referral issue has been adopted by only the Fourth Circuit, in contrast to the numerous circuits which have approved of referral in appropriate circumstances, Plaintiff has not shown a substantial likelihood of success on the merits. Moreover, the public interest will not be disserved by having the Commission decide issues within its primary jurisdiction, nor does the threatened "harm" to Plaintiff by having to proceed before the Commission outweigh the harm which Defendant would suffer if an injunction were issued.

Finally, it should be noted that Plaintiff also contends that Defendant has violated the automatic stay of the bankruptcy court, 11 U.S.C. § 362, by initiating the proceeding before the Commission. However, because this Court will refer the issues raised by Defendant's affirmative defenses to the Commission, the issue of whether the automatic stay has been violated is moot. Plaintiff does not even attempt to argue that referral by this Court of these issues to the Commission would violate the automatic stay. Accordingly, it is now

ORDERED AND ADJUDGED:

1. Plaintiff's motion for order permitting Plaintiff to file a reply (docket no. 60) is granted. The Clerk is directed to docket Plaintiff's reply memorandum and the attached affidavit in the Court file.

2. Defendant's motion for leave to file reply (docket no. 61) is granted. The Clerk is directed to docket Defendant's reply memorandum and reply affidavit in the Court file.

3. Plaintiff's motion for preliminary injunction (docket no. 35) is denied.

4. Defendant's motion for stay and referral to ICC (docket no. 46) is granted. The following issues are hereby referred to the Interstate Commerce Commission for appropriate findings and determination:

> (A) Whether Plaintiff's action in attempting to collect loss of discounts as a credit penalty for late payment of freight bills of P*I*E Nationwide, Inc., a motor common carrier regulated by the Commission, violates the Commission's Credit Rules, 49 C.F.R. § 1320, and/or is an unreasonable practice in violation of the Interstate Commerce Act.
>
> (B) Whether, in the event the rates now claimed are determined to be applicable, those rates are unreasonable in violation of the Interstate Commerce Act.

Further proceedings in this action in this Court are hereby stayed pending completion of proceedings before the Commission. The Clerk shall deliver a certified copy of this Order to the Commission.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 30th day of July, 1992.

/s/ John H. Moore, Jr.
United States District Judge

APPENDIX B

AFFIDAVIT OF DON H. NORMAN

DON H. NORMAN, first being duly sworn, makes this affidavit in support of Lloyd T. Whitaker, Trustee for Olympia Holding Corp. f/k/a P*I*E Nationwide, Inc., and Fidelcor Business Credit Corporation.

1. Affiant has personal knowledge of the facts contained herein.

2. Affiant is President and Owner of Don H. Norman Associates, Inc. (DNA), whose executive office and principal place of business is located at Suite 1190, 8301 Greensboro Drive, McLean, Virginia 22102, and with additional offices maintained within the Interstate Commerce Commission Building, Room 4330, in Washington, DC.

3. Don H. Norman Associates is a transportation consulting firm specializing in rate and tariff research and rate information dissemination involving motor carriers and railroads. It also is engaged in the preparation and publication of tariffs for surface transportation companies. DNA compiles, publishes, and files thousands of tariff pages annually with the Interstate Commerce Commission ("ICC") and other regulatory agencies.

4. The research and watching service aspects of DNA are personally monitored and reviewed by Affiant. These services include the preparation of pricing initiatives and daily briefings to carrier and shipper interests from our office within the ICC building. Over the past 35 years, Affiant has had the opportunity to review and research virtually every conceivable type of tariff initiative filed with the ICC. Since the inception of DNA, Affiant has been involved in the rate research and tariff publishing activities of DNA.

5. Affiant has prepared and sponsored verified statements, affidavits, and testimony as an expert witness before the ICC and the courts.

6. As part of his duties, Affiant monitors pleadings and decisions filed with and released by the ICC each day for carriers, shippers and attorney interests with particular emphasis on issues involving the applicability of the filed-rate doctrine following the Supreme Court's decision in *Maislin Industries* v. *Primary Steel* in July 1990.

7. Attached, as Exhibit 1, is a current listing of 177 cases which I monitor closely on a daily basis. All or almost all of these cases involve the issue of rate reasonableness submitted to the ICC for a determination by the ICC. Most were filed at the ICC after court referral of undercharge claims by trustees of bankrupt motor carriers. As can be seen, some date back to 1985 and 1986.

8. As of this date, the ICC has not rendered a single deicsion determining the reasonableness of rates in any of these cases. The ICC's published decision in Docket 40233, *Eastman Kodak Company—Advance United Expressways, Inc.*, served July 12, 1991, 1991 Fed. Carr. Cas. (CCH) ¶ 37,928, was a rate-applicability case and made no rate-reasonableness determination, but in *dicta* it did suggest one possible measure of reasonableness where a rate is erroneously cancelled and then reinstated.

AND AFFIANT FURTHER SAYETH NOT.

VERIFICATION

DISTRICT OF)
) ss:
COLUMBIA)

Don H. Norman, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

/s/ Don H. Norman
DON H. NORMAN

Subscribed and sworn to me, a Notary Public in and for the County and State above named, this 8th day of May, 1992.

/s/ Kathleen Quinn

My Commission Expires
April 14, 1994
KATHLEEN QUINN
Notary Public
District of Columbia

EXHIBIT 1

Pre	Doc	Imp	D001X	Title
MCC	10961	R	3/22/1985	Primary Steel, Inc.—Maislin Industries, U.S. Inc. Etal
MCC	30007	R	8/26/1986	Auto Specialties Manufacturing Co. —GAF Corporation, Eta
MCC	30013	R	9/17/1986	A.J. Hollander Company Etal v. Maislin Industries Inc.
MCC	30025	R	1/16/1987	Manuf. Consolidation Service—Pet For Declaratory
MCC	30082	C	1/04/1988	Marine Lumber Co.—Weyerhauser Company
MCC	30095	R		General Mills, Inc.—Tobler Transfer Company
MCC	30105	R	5/27/1988	Ideal Chemical & Supply Co. v. Rebel Motor Freight, Inc.
MCC	30137	R	12/19/1988	B & B Beverage Co. v. Eazor Special Serevices, Inc.
MCC	30140	R	12/20/1988	Sunshine Mills, Inc.—Rebel Motor Freight, Inc. Etal
MCC	30156	R	3/06/1989	Ormond Shops, Inc. v. Oneida Motor Freight, Inc.
MCC	30164	N	5/10/1989	Milne Truck Lines, Inc.—Mark Services, Inc.
NOM	40232	C	5/25/1989	Honeywell, Inc.—Transportation Systems International, I
NOM	40233	R	5/30/1989	Eastman Kodak Company
NOM	40264	N	7/24/1989	Profit Freight Systems, Inc.
NOM	40265	N	7/24/1989	Georgia Pacific Corp.
NOM	40287	N	8/15/1989	Lowe's Companies, Inc.—Rebel Motor Freight, Inc.
NOM	40294	N	8/22/1989	Amtrol, Inc. v. American Freight System, Inc.
NOM	40299	C	8/30/1989	Lee Way
NOM	40316	C	9/21/1989	Lubrication Engineers, Inc.—Rates & Practices—Lee Way BOL
NOM	40322	N	9/26/1989	Trans-Allied Audit Company, Inc.
NOM	40325	C	9/25/1989	Midwest Air Freight Shippers Assn. Anco Products, Inc. Et
NOM	40331	N	10/10/1989	N. P. Express, Inc.—Unzicker Trucking, Inc.
NOM	40333	N	10/13/1989	Ferguson Perforating Wire & Co. —Petition for Declarat
NOM	40335	C	10/17/1989	Profit Freight Systems, Inc.—Priority Transfer, Inc.
NOM	40338	C	10/20/1989	Cole Well Corp Et Al—Pet. for Dec Order—Murphy Motor
NOM	40340	N	10/24/1989	Motorola, Inc.

Pre	Doc	Imp	D001X	Title
NOM	40348	C	11/06/1989	Commerce Express, Inc.—United Shipping Company, Inc
NOM	40350	C	11/08/1989	Twin Modal, Inc.
NOM	40360	N	12/06/1989	Senator Linie (USA), Inc. v. White Star Lines, Inc.
NOM	40367	N	12/21/1989	7/24 Freight Sales, Inc—Sharm Express, Inc.
NOM	40377	N	1/03/1990	P&O Containers (TFL) Ltd. v. C&H Nationwide
NOM	40380	N	1/05/1990	Curriculum Associates, Inc.
NOM	40383	C	1/09/1990	Wescar Freight Inc. v. Hussmann Corporation
NOM	40389	C	1/16/1990	Piedmont Carloading Service v. Sharm Express, Inc.
NOM	40398	C	2/14/1990	General Binding Corporation
NOM	40400	C	2/26/1990	Lubrication Engineers, Inc.—Advance—United Expressways
NOM	40405	C	3/06/1990	Spurrier Chemical Companies, Inc. —Advance United Expr
NOM	40415	C	3/21/1990	Sugar Creek Packing Company
NOM	40425	C	4/03/1990	Vertex Corporation v. Southwest Equipment Rental, Inc.
NOM	40435	C	4/24/1990	APPCO Paper and Plasatics Corp.—Delta Traffic Svc., I
NOM	40438	C	4/27/1990	BMC Industries, Inc.—James G. Duffy
NOM	40459	N	7/02/1990	The Woodbridge Group—Consolidated Freightways
NOM	40465	C	7/17/1990	Bemis Company, Inc.—Advance—United Expressways, Inc.
NOM	40470	N	8/02/1990	Reading Body Works, Inc. v. Rose-Way, Inc.
NOM	40474	C	9/05/1990	National Checking Company v. Transp. Systems Internatio
NOM	40480	N	9/24/1990	Reading Body Works, Inc.—Rose-Way, Inc.
NOM	40488	C	10/18/1990	Acme Steel Company v. Wenham Transportation, Inc.
NOM	40492	C	11/21/1990	Transtop, Incorporated v. Oneida Motor Freight, Inc., E
NOM	40500	C	1/07/1991	Norwest Publishing Co.—Milne Truck Lines, Inc.
NOM	40501	N	1/09/1991	Saver Company, Inc.—A-Line Ltd.
NOM	40505	N	1/16/1991	Chestnut Display Systems v. Yowell Transportation Servi
NOM	40507	N	1/18/1991	Admiral Transportation, Inc.
NOM	40509	C	1/23/1991	Maxell Corporation of America, Inc. —Advance—United Expr

NOM	40512	C	2/07/1991	Brown-Strauss Steel, Inc.—Cross-E Transportation, Inc
NOM	40514	C	2/13/1991	Armstrong World Industries, Inc.—Southwest Equipment
NOM	40515	C	2/19/1991	Gantrade Corporation v. Ritter Transportation, Inc.
NOM	40516	C	2/20/1991	The BFGoodrich Company—Freightcor Services, Inc.
NOM	40517	C	2/20/1991	CVN Companies, Inc. v. United Shipping Company, Inc.
NOM	40524	C	3/19/1991	Anchor Glass Container Corp.—Horn's Motor Express
NOM	40534	C	4/02/1991	SEAPAC Services, Inc. Pennco Trucking, Inc.
NOM	40541	C	4/09/1991	W. W. Grainger, Inc. v. United Shipping Company, Inc.
NOM	40559	N	4/30/1991	Ragland-Borg Corporation— Lifschultz Fast Freight, Inc.
NOM	40585	C	5/09/1991	W. R. Grace & Company v. Overland Express, Inc.
NOM	40586	C	5/10/1991	Mass Merchandisers, Inc. v. Freight-Cor Services, Inc.
NOM	40587	N	5/15/1991	General Chemical Corporation v. A-Line, Ltd.
NOM	40594	C	6/06/1991	Brody Associates, Inc.-Rose Way, Inc.
NOM	40598	C	6/10/1991	American Distribution Management, Inc. v. Southwest Equip.
NOM	40599	C	6/11/1991	Friedman Bag Company, Inc. v. A.T.F. Trucking Company
NOM	40602	C	6/17/1991	Menasha Corporation & M. T. Rogers Co. v. United Shippin
NOM	40605	C	6/25/1991	Kuhlman Corporation v. Freightcor Services, Inc.
NOM	40607	C	6/26/1991	Asset Transportation—Rates & Practices—Hagen, Inc.
NOM	40608	C	6/27/1991	Manville Products Corp—Rates & Practices—Express Transp
NOM	40610	C	7/01/1991	Southwire Company v. Freightcor Services, Inc.
NOM	40615	N	7/15/1991	All-Luminum Products Co., Inc. v. A-Line Ltd.
NOM	40619	N	7/16/1991	Thomasville Furniture Industries v. Dietz Motor Lines.
NOM	40623	C	7/26/1991	A. Kush & Associates—Rates & Practices—Lifschultz Fast
NOM	40631	C	7/31/1991	Exxon Chemical Americas v. A.T.F. Trucking Company, In
NOM	40633	C	8/01/1991	Coyle Strping & Supply—Rates & Practices—True Transport

Pre	Doc	Imp	D001X	Title
NOM	40640	C	8/09/1991	Have A Portion, Inc. v. Total Transportation, Inc.
NOM	40642	C	8/12/1991	Quality Fasteners Co., Inc. v. A-Line, Ltd.
NOM	40643	C	8/12/1991	J Sugihara Trading of California v. A-Line, Ltd.
NOM	40645	C	8/15/1991	J.E.B. Enterprises, Inc. v. Best Refrigerated Express
NOM	40646	C	8/16/1991	Hudson-Thompson, Inc. v. Silver Fleet Express, Inc.
NOM	40647	C	8/16/1991	Scrivner, Inc.—Rates & Practices—Silver Fleet Express
NOM	40648	N	8/15/1991	Viking Office Products, Inc. v. Brown Transport, Corp.
NOM	40658	C	8/27/1991	Co-Operative Shippers, Inc. v. Old Dominion Freight Lin
NOM	40660	C	9/03/1991	Eaton Corporation v. A-Line, Ltd.
NOM	40667	N	9/18/1991	The Okonite Company v. C & H Nationwide, Inc.
NOM	40668	N	9/20/1991	The Crowell Corporation vs. A-Line Ltd.
NOM	40669	C	10/01/1991	Ram Trans, Inc. v. Rose Way, Inc.
NOM	40672	C	10/07/1991	Ampad Corporation—Branch Motor Express
NOM	40673	C	10/15/1991	Midwest Air Freight Shippers Assoc. v. Sharm Express, I
NOM	40675	C	10/22/1991	Twin Modal, Inc. Twin Continental, Inc.
NOM	40676	C	10/24/1991	American Distribution—Rates & Practices—Best Refrigerat
NOM	40677	C	10/24/1991	Midwest Carriers Corp—Rates & Practices—Best Refrigera
NOM	40678	C	10/24/1991	Productive Transportation—Rates & Practices—Best Refrig
NOM	40680	C	11/04/1991	Lynn Transportation—Rates & Practices—Best Refrigerated
NOM	40681	C	11/04/1991	Sipco, Inc.—Rates & Practices—Best Refrigerated
NOM	40682	C	11/04/1991	R.D. Industries, Inc.-Silvey Refrigerated Carriers, Inc.
NOM	40683	C	11/04/1991	Cook Family Foods Ltd.-Best Refrigerated Express, Inc.
NOM	40684	C	11/04/1991	Cook Family Foods Lts—Rates & Practices—Silvey Refrigerat
NOM	40685	C	11/04/1991	Conagra, Inc.-Wheelers Group—Silvey Refrigerated
NOM	40686	C	11/04/1991	Conagra, Inc. (N. States Beef)-Rates Silvey Refrigerated

NOM	40687	C	11/12/1991	Anchor Glass et al—Rates & Practices—Freightcor Service
NOM	40689	C	11/18/1991	Topco Associates—Rates & Practices F. P. Transportatio
NOM	40690	C	11/19/1991	American Trading & Production-Rates & Practices-A-Line Lt
NOM	40691	C	11/17/1991	Best Refrigerated Express v. GS Brokerage, Inc.
NOM	40695	C	11/25/1991	Atlantis Express, Inc. v. Twin Modal, Inc.
NOM	40696	C	11/29/1991	S.O. Textil Co.—Rates & Practices—Brinke Transportati
NOM	40698	C	1/06/1992	Display Unlimited—Rates & Practices—Brinke Transporta
NOM	40699	C	1/06/1992	J. M. Bass, Inc.—Rates & Practices—Binke Transportat
NOM	40700	C	11/29/1991	Panasonic Company—Rates & Practices—Motor Freight Lin
NOM	40701	N	12/02/1991	O.C. Adhesives Corp.,-Et. Al v. Ancar Transport Inc.
NOM	40702	C	12/02/1991	Alan Tracey, Inc. v. Brinke Transportation Corp.
NOM	40704	C	11/29/1991	LA Preferida, Inc.—Rates & Practices—Santa Fe Trail
NOM	40705	C	12/06/1991	Eastman Kodak Company v. Ambassador Factors Division
NOM	40706	C	12/06/1991	E. A. Miller, Inc.—Best Refrigerated Express, Inc.
NOM	40707	C	12/09/1991	International Multifoods Corporation v. Ambassador Facto
NOM	40708	N	12/09/1991	Farah U.S.A., Inc. and Farah Manufacturing, Inc. v AAA
NOM	40710	C	12/10/1991	Trans America Trucking, Inc. v Best Refrigerated Express
NOM	40713	C	12/12/1991	Intermetro Industries Corporation—Zurek Express, Inc.
NOM	40714	C	12/12/1991	American National Can Company—M. T. I. Transport, Inc.
NOM	40715	C	12/12/1991	Martha White Foods—Rates & Practices—Unsicker Truckin
NOM	40716	C	12/16/1991	Johnson Truck Brokers—Bankruptcy Estate of Murphy Mot
NOM	40718	C	12/17/1991	Rocky Mountain Express Corp.—Best Refrigerated Expres
NOM	40719	C	12/20/1991	Marathon Agents, Inc.—Rates & Practices-Best Refrigera
NOM	40720	C	12/20/1991	Sumark Services-Rates & Practices-Best Refrigerated Ex
NOM	40721	C	12/20/1991	Delta Plastics, Inc.-Rates & Practices Best Refrigera

Pre	Doc	Imp	D001X	Title
NOM	40722	C	12/20/1991	Brown Packing Company-Rates & Practices-Best Refrigerat
NOM	40723	C	12/20/1991	Green Bay Packaging, Inc.-Murphy Motor Freight Lines, I
NOM	40724	C	12/20/1991	New England Pottery Co., Inc. Rates & Practices-Crest
NOM	40725	C	1/02/1992	Hi-Country Lame Co.—Best Refrigerated Express, Inc.
NOM	40726	C	12/23/1991	Century Transportation, Inc.—Best Refrigerated Express
NOM	40728	C	1/02/1992	Scheduled Transportation, Inc.—Best Refrigerated Expr
NOM	40729	C	1/02/1992	Sara Lee Corporation—Best Refrigerated Express, Inc.
NOM	40730	C	12/27/1991	Valmont Industries, Inc.—Rose-Way, Inc.
NOM	40731	C	12/27/1991	Berger and Company—Rose-Way, Inc.
NOM	40733	N	1/06/1992	Steinbach, Inc. v. Lifschultz Fast Freight, Inc.
NOM	40734	N	1/07/1992	Acme Manufacturing Co. v. Colonial Fast Freight Lines,
NOM	40735	N	1/09/1992	Fisk Alloy Wire, Inc. v. Lifschultz Fast Freight, Inc.
NOM	40738	N	1/27/1992	Admiral Transportation, Inc. v. F. P. Corp.
NOM	40739	C	1/27/1992	Georgia-Pacific Corporation—IMFS, Inc.
NOM	40740	N	1/29/1992	Acme Cutrate, Inc.—Penerex Carpet Services, Inc.
NOM	40741	N	1/30/1992	Gulf States Paper Corp. v. Hawkeye Refrigerated Services
NOM	40742	C	1/30/1992	Beloit Corporation and Rice Lake Bearing, Inc. v Freigh
NOM	40743	C	1/31/1992	Taurus Food Producs, Inc. v. Emporia Motor Freight
NOM	40747	C	2/12/1992	Freudenberg Nonwoven-Crest Truck Lines, Inc.
NOM	40748	C	2/13/1992	Blue Star Foods, Inc.—Freightcor Services, Inc.
NOM	40749	C	2/14/1992	Big T Transfer, Inc.—Best Refrigerated Express, Inc.
NOM	40750	C	2/18/1992	FTR Transport, Inc.—Thomas F. Hoarty, Jr. for Best Re
NOM	40751	N	2/19/1992	Dillard Department Stores, Inc.—Fidelcor Business Cre
NOM	40752	C	2/18/1992	Joseph L. Novak—Best Refrigerated Express, Inc.

NOM	40753	C	2/18/1992	Best Refrigerated Express, Inc. v. C. H. Robinson Compa
NOM	40754	C	2/21/1992	Madison Industries Inc.—Ricter Transportation, Inc.
NOM	40755	C	2/24/1992	Rose Day, Inc. v. Roberts & Dybdabl Inc.
NOM	40756	N	2/24/1992	Ball Transport, Inc—Continental Carrier Corp. & MFC
NOM	40757	C	2/28/1992	Jeffrey L. Moore, DBA-Quest Transp. v. Roseway, Inc.
NOM	40758	C	2/28/1992	Ralph Herring, DBA-Kustom Transport v. Roseway, Inc.
NOM	40759	N	3/02/1992	Evergreen America Corp. vs Bowman Transportation, Inc.
NOM	40760	C	3/02/1992	California Enterprises Consolidated, Inc. v. Roseway, Inc.
NOM	40761	C	3/02/1992	Waymouth Farms, Inc. v. Advance-United Expressways, Inc
NOM	40763	C	3/02/1992	Holtzman's Little Folk Shop, Inc's.—Lifschultz Fast F
NOM	40765	C	3/09/1992	Best Refrigerated Express, Inc.—James Fleming Truckin
NOM	40766	C	3/10/1992	Freight Agency, Inc. v. Rose-Way, Inc.
NOM	40767	C	3/11/1992	Gutchess Lumber Company, Inc., et al.—Canny Trucking C
NOM	40768	C	3/13/1992	Greg Orschelin Transportation v. Best Refrigerated Expr
NOM	40769	C	3/13/1992	Bennett Transportation v. Best Refrigerated Express, In
NOM	40770	C	3/13/1992	Ralph Godic v. Best Refrigerated Express, Inc.
NOM	40771	C	3/13/1992	U.S. Comex Corporation v. Best Refrigerated Express,
NOM	40772	N	3/13/1992	American Lockers Security—DDF Transportation et al.
NOM	40775	C	3/18/1992	Wyandot, Inc.—Thomas M. Mullinex
NOM	40778	C	3/26/1992	Domtar Gypsum, Inc.—Rose-Way, Inc.
NOM	40779	C	3/27/1992	General Management, Inc.—Best Refrigerated Express, I
NOM	40789	C	4/16/1992	Standard Transp. Services, Inc.—Atlantis Express, Inc.
NOM	40790	C	4/17/1992	Conagra, Inc.—Unzicker Trucking, Inc.
NOM	40792	C	4/24/1992	Vantran Electric Inc.—Rose-Way, Inc.
NOM	40793	C	4/30/1992	Basins, Inc.—Northeast Carrier, Inc.

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case Nos. 90-4195-BKC-3P7 and
90-4223-BKC-3P7

Jointly Administered

Adv. No. 91-448

IN RE OLYMPIA HOLDING CORPORATION,
a/k/a P-I-E NATIONWIDE, INC., *et al.*,
Debtors.

LLOYD T. WHITAKER AS CHAPTER 7 TRUSTEE FOR
OLYMPIA HOLDING CORPORATION,
a/k/a P-I-E NATIONWIDE, INC.,
Plaintiff,

v.

YOUNKERS, INC., a Delaware corporation,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR REFERRAL TO THE INTERSTATE COMMERCE COMMISSION

Upon the Findings of Fact and Conclusions of Law separately entered, it is

ORDERED:

Defendant's Motion for Referral to the Interstate Commerce Commission is denied.

DATED: June 15, 1992, in Jacksonville, Florida.

/s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case Nos. 90-4195-BKC-3P7 and
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a k a P-I-E NATIONWIDE, INC., *et al.*,
Debtors.

LLOYD T. WHITAKER AS CHAPTER 7 TRUSTEE FOR
OLYMPIA HOLDING CORPORATION,
a k a P-I-E NATIONWIDE, INC.,
Plaintiff,

v.

YOUNKERS, INC., a Delaware corporation,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This adversary proceeding came to be heard upon the Motion of Defendant for Referral to the Interstate Commerce Commission. A hearing was held on December 13, 1991. Upon the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

Debtor was both a motor common and motor contract carrier operating in interstate commerce pursuant to the

authority of the Interstate Commerce Commission ("ICC").

Debtor filed tariffs with the ICC which provided for a Class 70 exception rate with a discount of 55-59% off of that Class 70 exception rate. Subsequent to the filing of such tariff rate, debtor filed tariff item 721 stating that any customer not paying its bill within 60 days of the date of the invoice would lose its class exception and its discount ("loss-of-discount tariff").

Debtor filed a chapter 11 petition on October 16, 1990. Lloyd T. Whitaker was appointed as chapter 11 trustee on December 26, 1990. The case was subsequently converted to chapter 7 on March 11, 1991, and Lloyd T. Whitaker was appointed the chapter 7 trustee.

Defendant, as shipper, and Debtor, as common carrier, did business together on a tariff basis for a substantial amount of time.

In late November and early December of 1990, a dispute arose between debtor and defendant. Defendant claimed approximately $14,000.00 against debtor for goods lost or damaged in shipment and withheld payment on the shipping bills.

Plaintiff conducted an audit of debtor's records and determined that the original amounts billed were not properly rated in accordance with the filed tariff. Accordingly, the plaintiff sent new bills to defendant which did not include the class exception or the discount and which were rerated at the full class rates. The rerated bills represented an increase in rates from the original bills of at least 65-69%. Plaintiff based the change on the loss-of-discount tariff. Defendant refused to pay the rerated bills.

On June 20, 1991, plaintiffs filed this adversary proceeding seeking turnover of property and a money judgment for $31,516.48, based on the rerated bills. Defendant filed an answer raising the defenses of set-off and

unreasonable rates and asked that the proceeding be referred to the ICC. With plaintiff's consent, defendant later filed an amended answer asserting further defenses, as well as a counterclaim for damages.

Defendant contends that 1) the tariff rates on which plaintiff relies are inapplicable to the shipments in question; 2) if the rates do apply, they are unreasonable and unlawful under 49 U.S.C. § 10701(a); 3) the tariff rules violate 49 U.S.C. 10761 and ICC regulations contained in 49 C.F.R. Part 1320; and 4) some sums sought by plaintiff were not demanded until after the requisite time periods of 49 C.F.R. parts 1320.2(e)(2) and (3), 1320.2(g)(2)(vi).

Plaintiff, on the other hand, argues that 1) this Court does not have jurisdiction under 28 U.S.C. § 1336(b) to make a referral to the ICC; 2) referral is not necessary because defendant must pay the filed rate and then seek reparations; 3) the loss-of-discount tariff does not violate ICC credit regulations, and 4) violation of the credit regulations is not a defense to enforcement of filed tariff rates.

Thus, the Court must initially determine whether it has the authority under 28 U.S.C. § 1336 to refer any issue to the ICC. If the Court does have such power, the question arises as to whether the issues raised in this proceeding must be resolved by the administrative agency and if so, at what point in time must such a determination be made.

Conclusions of Law

A. Referral Power

Congress provided in 28 U.S.C. § 1334(b) that ". . . district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Under 28 U.S.C. § 157(a), the district court may provide that any

or all cases or proceedings arising under title 11 shall be referred to the bankruptcy judges. The United States District Court for the Middle District of Florida has entered such a referral order. Rule 104, Local Rules for the Middle District of Florida. Accordingly, this bankruptcy case and this adversary proceeding have been referred to this Court.

The district court's jurisdiction to refer issues to the ICC is embodied in 28 U.S.C. § 1336, which provides in relevant part:

> (a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.
>
> (b) When a district court or the United states Claims Court refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

Under the district court's referral order, the bankruptcy court is sitting in the adversary proceeding as a unit of the district court. Thus, for purposes of 28 U.S.C. § 1336, "district court" includes the bankruptcy court. *Railway Labor Executives' Assn v. ICC*, 894 F.2d 915 (7th Cir.) *reh'g denied*, 908 F.2d 127 (7th Cir. 1990); *In re Total Transportation, Inc.*, 84 B.R. 590 (D.Minn. 1988). Accordingly, this Court has jurisdiction to refer the issues at hand to the ICC.

It should also be noted that although his brief argues to the contrary, plaintiff's counsel stated during the hearing that this Court has "the power to refer matters to any federal agency, including the ICC." (Transcript at page 9).

B. Primary Jurisdiction

The doctrine of primary jurisdiction serves to ensure that the courts provide administrative agencies charged with specific regulatory responsibilities the appropriate opportunity to fulfill such duties. The United States Supreme Court explained the doctrine:

> "Primary jurisdiction," . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . .
>
> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

United States v. Western P. R. Co., 352 U.S. 59, 63-64 (1956) (citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940)). The Court then indicated that the doctrine was intended to promote uniformity and consistency, as well as provide expert and specialized knowledge when resolving administrative questions. *Id.; Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

The issues in this proceeding primarily involve the valadity of the loss-of-discount tariff and the reasonableness of the filed rate. In *Western P. R. Co.* the Court also indicated that where the issue merely involved construction

of a tariff, courts could decide it as an issue "solely of law." *Western P. R. Co.*, 352 U.S. at 66. Thus, as long as discretion in technical matters requiring a knowledge of intricate facts is not being exercised, a court may decide the issues.

The Court of Appeals for the Seventh Circuit has held that ". . . courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation, rather than reasonableness." *Interstate Commerce Com. v. All-American, Inc.*, 505 F.2d 1360, 1363 (7th Cir. 1974).

The defendant contends that the loss-of-discount tariff if unlawful because it does not comply with the ICC credit regulations. Plaintiff argues that the credit regulations are irrelevant and that the loss-of-discount tariff is merely a condition precedent to participation in the discount programs. Accordingly, the issue involves either a violation of regulations or tariff interpretation, both of which are within the original jurisdiction of this Court.

The Supreme Court has indicated that jurisdiction to determine the reasonableness of rates is vested with the ICC: "'The [Interstate Commerce) Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate.'" *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, ——, 110 S. Ct. 2759, 2767 (1990) (quoting *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 384 (1932)). The question of the reasonableness of debtor's filed rates should be properly decided by the ICC.

Both the parties admit that the ICC is the expert body vested with the authority to resolve a legitimate issue of rate reasonableness. However, the parties differ on their assessment as to when such a determination is properly made.

C. Rate Reasonableness

Currently the Circuit Courts of Appeal are split on the issue of when the ICC should determine whether a filed rate is reasonable. The first, third, seventh, and eighth circuits adhere to the stay and refer approach. *Delta Traffic Service, Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990); *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd*, 919 F.2d 134 (3rd Cir. 1990); *Western Transportation Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982); *Atlantis Express, Inc. v. Standard Transp. Services, Inc.*, 955 F.2d 529 (8th Cir. 1992). Those circuits hold that the judicial proceeding must be stayed and the issue of rate reasonableness referred to the ICC for determination. In so holding the cases necessarily recognize rate reasonableness as a defense to a proceeding to collect the filed rate.

The fourth and fifth circuits, on the other hand, hold that rate reasonableness cannot be used as a defense. *In re Carolina Motor Express, Inc.*, 949 F.2d 107, 110-11 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3779 (1992); *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 391-92 (5th Cir. 1989). The cases indicate that the shipper must pay the filed rate and then the exclusive remedy for recovering excess charges is through the statutory reparations action. At that time the ICC would determine the reasonableness of a given rate.

Neither the District Court for the Middle District of Florida nor the Court of Appeals for the Eleventh Circuit has spoken on this issue. This Court finds that the rationale behind the holdings in the fourth and fifth circuits is more persuasive and, thus, holds that rate reasonable is not properly asserted as defense to collection of the filed rate.

Prior to the enactment of the Motor Carriers Act of 1935, common law recognized a shipper's right to restitution for unreasonable charges. *Arizona Grocery Company v. Atchison, T. & S. F. R. Company*, 284 U.S. 370 (1932); *Arkadelphia Milling Company v. St. Louis S. R. Co.*, 249 U.S. 134 (1919). Subsequent to such enactment, it was assumed that the savings clause, 49 U.S.C. § 316(j),[1] provided the basis for a continued right of restitution.

However, the United States Supreme Court subsequently held that the restitution remedy afforded shippers under common law had not survived. *T. I. M. E. Incorporated v. United States*, 359 U.S. 464 (1959). In holding that a shipper could not challenge the reasonableness of a rate in post-shipment litigation, the Court left shippers without any remedy when a filed rate was found to be unreasonable.

Congress recognized the problem and enacted 49 U.S.C. § 304a in 1965 in an effort to provide shippers with relief. Section 304a provided that shippers could recover overcharges by filing an action at law for "reparations" within a certain time period. The section specifically defined reparations as damages resulting from charges based on a tariff found to be unreasonable by the ICC. Section 304a has since been recodified as 49 U.S.C. §§ 11705(b)(3) and 11706(c)(2), which read, in relevant part:

> § 11705. Rights and remedies of persons injured by certain carriers.
>
> (b)(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV or chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

---

[1] Section 316(j) provides: "Nothing in this section shall be held to extinguish any remedy or right of action; not inconsistent herewith."

§ 11706. Limitation on actions by and against common carriers.

(c)(2) A person must begin a civil action to recover damages under section 11705(b)(3) of this title within 2 years after the claim accrues.

The statute, by its terms, provides a procedure through which a shipper may challenge a filed rate and recover "reparations" for excessive amounts paid. The scheme does not provide for the use of the right to reparations as a defense. The sole and exclusive remedy provided is a post-payment challenge to the rate reasonableness accompanied by a request for reparations. *In re Carolina Motor Express, Inc.*, 949 F.2d 107, 110-11 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W. 3779 (1992); *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388, 391-92 (5th Cir. 1989); *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082, 1085 (5th Cir. 1974); *Lifschultz Fast Freight, Inc. v. Rainbow Shops, Inc.*, 784 F.Supp. 89, 93 (S.D.N.Y. 1992) ("The very characterization of the remedy in the statute—'reparations'— suggests a rule of pay first and sue later.").

Rejection of reasonableness as a defense may lead to a harsh result, but it is the result dictated by the terms of the statute. In addition, it serves to support the filed rate doctrine espoused by the United States Supreme Court:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it. . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & N. R. Co. v. Maxwell, 237 U.S. 94, 97 (1915). The Supreme Court recently reiterated the importance of the filed rate doctrine in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, ——, 110 S.Ct. 2759, 2766-67 (1990).

By refusing to allow the defendant to assert rate reasonableness as a defense the Court not only adheres to the statutory scheme, but also protects the filed rate doctrine and its underlying policy of discouraging price discrimination.

D. Conclusion

This Court has the jurisdiction to refer the issues raised to the ICC, but concludes that such referral is inappropriate at this time. Although the ICC has primary jurisdiction over rate reasonableness questions and is the proper body to make such determinations, rate reasonableness is not a defense to a proceeding to collect the filed rate. Defendant's sole remedy for excessive charges is through the statutory reparations action.

A separate order denying defendant's motion for referral to the ICC will be entered.

DATED: June 15, 1992, in Jacksonville, Florida.

/s/ George L. Proctor
GEORGE L. PROCTOR
United States Bankruptcy Judge

Supreme Court, U.S.
FILED
SEP 2 1992
OFFICE OF THE CLERK

No. 91-1496

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PETER C. REITER AND CALIFORNIA CONSOLIDATED ENTERPRISES, INC.,
Petitioners,

V.

LANGDON M. COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC., MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMERICAN FREIGHT SYSTEM, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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Date: September 2, 1992

QUESTION PRESENTED

Amicus Curiae will address the following question:

Whether a claim of unreasonableness of a published and legally applicable tariff rate is a defense to an action at law to collect that tariff rate mandating stay of proceedings and referral of the issue to the Interstate Commerce Commission on the question of whether the filed rate is "reasonable" within the meaning of the Interstate Commerce Act.

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IN THE
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BRIEF OF AMERICAN FREIGHT SYSTEM, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS CURIAE

Amicus Curiae is American Freight System, Inc., 9393 W. 110th Street, Overland Park, Kansas 66210 (hereinafter referred to as "AFS"). AFS was a debtor-in-possession under Chapter 11 of the Bankruptcy Code in

Case No. 88-41050-11 commenced on August 16, 1988 before the United States Bankruptcy Court for the District of Kansas, Topeka Division. It is currently a debtor pursuant to a confirmed Plan of Reorganization dated June 10, 1991. Prior to its bankruptcy, AFS and its affiliates were common carriers by motor vehicle with annual revenues of approximately 500 million. Pursuant to the Plan, all assets and liabilities of AFS's Parent Company except specified cash and liabilities retained for its reorganization were transferred to AFS for liquidation. The reorganized Parent resumed its trucking business. AFS has to date distributed to its unsecured creditors sixty cents on each $1.00 of allowed claims and has scheduled an additional payment of twenty cents on the dollar to be made on or about September 11, 1992.

The issues presented by this case are of extreme importance to AFS. AFS has sued to recover of (1) original freight bill charges, (2) pre-petition charges representing portions of original freight bills not paid, (3) charges based upon freight bill corrections issued prior to bankruptcy and (4) freight bills corrected subsequent to its petition in bankruptcy. Actions pend for recovery of millions of dollars in both the pre-petition and the post-petition categories. Approximately $1 million of charges have been referred by the bankruptcy court and over $3 million more is subject to motions for reference over to the Interstate Commerce Commission (hereinafter referred to as the "ICC") for consideration of the reasonableness of the legal rates, with the orders of referral on appeal to the District Court. Though the bases

of charges and undercharges are myriad, neither the motions for reference over nor the orders issued by the bankruptcy court make any distinction as to why an issue of unreasonableness might attach to the type of shipments or type of charges within shipments in issue.

With no outside rate audit firm assistance, AFS conducted a post-bankruptcy audit of rates and charges on 16.8 million freight bills originally issued for $1.8 billion dollars from which approximately $26 million of undercharges were determined to be due: a 1.4% error rate.

Since bankruptcy, AFS has collected over $60 million of freight bills including undercharges. Most of the receivables collected (over $50 million), were original freight bill receivables, in the main collected immediately following bankruptcy. Had the remedy here sought by the major shipper interests been in effect, on the mere claim of unreasonableness, the entire collection stream could have been denied to AFS. Such an occurrence would have prevented the filing and implementation of AFS's Plan of Reorganization and the payment of unsecured creditors described above.

AFS never assumed there was any legal authority for it to agree to any rates and charges other than common carrier rates on file with the ICC or other rates legally published and legally effective. Prior to *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct. 2759 (1990), AFS construed the Interstate Commerce Act and the decisions of this Court to prohibit the "Negotiated Rates Policy" enunciated by the ICC, which it viewed to

be not only a violation of the "filed rate doctrine," but also a violation of the crime provisions (illegal rebating) contained in Chapter 119 of Title 49 of the United States Code. AFS did not negotiate with parties and then fail to make publications following those negotiations.

Although AFS's corrected freight bill charges result from errors no different from those existing to prior to the Motor Carrier Act of 1980 (hereinafter referred to as "MC Act"), under which the ICC spawned the "Negotiated Rate Policy", the mere fact of bankruptcy sweeps all cases into the same swirl of rhetoric and delayed or avoided payment of legally applicable tariff charges with cases of negotiated rates with no tariff publication made. Some of the cost of delay is that since AFS's bankruptcy, 83 companies owing freight bill debts to AFS, of which 66 were defendants in lawsuits, have filed in bankruptcy and an additional 104 companies, of which 90 were defendants in lawsuits have closed or gone out of business, in total leaving over $500,000 of unpaid freight bill debts.

STATEMENT

AFS adopts the statement of the case presented in the opinion of the Court of Appeals (Petitioner's Appeal 2a-5a), but offers the following description of the business and regulatory circumstances of the case in the hope that it will assist the Court in its resolution of the issues.

The MC Act was a watershed change in the Interstate Commerce Act. Years of advocacy to Congress about the extent to which the MC Act should be amended

preceded enactment. The action taken by the Congress did not satisfy all advocates including, as of today, the majority of the Interstate Commerce Commission for the majority has presented to Congress its advocacy for reduction and/or total elimination of economic regulation of the trucking industry and Chairman Philbin has publicly announced his disdain for the "filed rate doctrine" and affinity for below cost pricing. See *Brief of Amicus Leonard L. Gumport* at 14 and Appendix A.

The sections of the Interstate Commerce Act providing the regulatory standards for just and reasonable, not unjustly discriminatory, and not wastefully destructive competitive rates, 49 U.S.C. §§ 10701, 10704, 10705, 10761 and supporting sections of Title 49, were left essentially unchanged by the MC Act of 1980. The MC Act of 1980 continued without change the charge to the Commission of the transportation policy, 49 U.S.C. § 10101:

> (1) In regulating those modes - (A) to recognize and preserve the inherent advantage of each mode of transportation; (B) to promote, safe, adequate, economical, and efficient transportation; (C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers; (D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive

competitive practices; (E) to cooperate with each state and officials on each state on transportation matters; and (F) to encourage fair wages and working conditions in the transportation industry;

The change made by the MC Act occurred in paragraph 2 of the transportation policy which reads:

(2) regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system;

and (I) promote intermodal transportation; and

retaining the essential elements of the regulatory structure not changed by the MC Act by which it is possible to establish and maintain reasonable rates which are not unjustly discriminatory. The ICC was to foster the improvement of the motor carrier industry by application of the rigors of the existing principles stated in paragraph 1 of the Transportation Policy with a view toward accomplishing the goals added in paragraph 2.

Even though the basic standards of the Interstate Commerce Act were not changed, AFS experienced pressures until bankruptcy to establish rates for specific shippers far below the bare variable, out-of-pocket cost of performing the service. In order to survive when non-compensatory rates were required either short term or long term to maintain the totality of the system until the problem could be fixed (hopefully), other shippers were charged rates higher than they would otherwise pay to subsidize major shippers. Contrary to the assertions of the *Amici Curiae* in support of the *Petitioners, The National Industrial Transportation League, et al.* (hereinafter referred to as "the Major Shipper Interests"), brief, page 4 and fn.4, AFS discounts were not made to reduce the class rate levels on the basis that those rates were unreasonably high. Some shippers paid the class rates, others obtained small discounts and major shippers obtained, eventually as the decade progressed, huge discounts.

The ICC has watched a massive transfer of motor carrier assets to shippers powerful enough to extract huge discounts. Large shippers of freight have permitted to exert full market power without any limitation. That clout has been enhanced by shortened notice to effect publications of reductions in rates from 30 days' to 1 day's notice. This increase in the velocity of rate changes was not enacted by Congress in the MC Act; the ICC provided for the increased velocity on the urging by shipper interests. See *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarded Rates*, 1 ICC 2d 146 (1984). In this case, the advocates and beneficiaries of such policy seek relief from a situation of their own making.

If the shipping community were now advised it need not pay the legally applicable freight charges until such were reviewed by the ICC, it is impossible to estimate the amount of further losses that would be experienced by the motor carrier industry. Such a holding would emasculate the time of payment requirements of the ICC credit regulations. 49 C.F.R. Part 1320. The relief requested by the major shipping interests would destroy the statutory requirement that the legal charges be timely collected.

SUMMARY OF ARGUMENT

The Petitioners and supporting *Amici* attempt to carve out a bankruptcy exception to the filed rate doctrine. Such an exception is contrary to statute and this Court's

precedent. This Court's precedent has strictly held that under the Interstate Commerce Act the shipper was bound to pay the filed rate. *Arizona Grocery Co. v. Atchison, T. & S. F. R., Co.*, 284 U.S. 370, 384-385 (1932). The filed rate doctrine was most recently upheld in this Court's decision in *Maislin*.

The shipper's only remedy for imposition of unreasonable motor carrier rates in the past is contained in 49 U.S.C. § 11705(b)(3) which provides for damages resulting from the imposition of rates for transportation that the ICC finds unreasonable. Petitioners and *Amici* seek to avoid the requirements of 11705 by asserting that whenever a rate reasonableness defense is raised against a bankrupt carrier the court must refer the issue to the ICC under the doctrine of primary jurisidction for a determination of rate reasonableness. Not only is the mere phrasing of an issue as a matter of rate reasonableness insufficient to invoke the primary jurisdiction of the ICC, see *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), the procedure sought by the Petitioners and supporting *Amici* is equivalent to the procedure declared unauthorized and invalid by the Court in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

Petitioners and *Amici* assert that prejudice to shippers awarded reparations will result from an inability to obtain payment of reparations because of the carrier's bankruptcy. The legal rights of the shipper are not prejudiced, however. Upon payment of the legal rates and any subsequent award of reparations, the shipper will become entitled to a pro rata share of the assets available

to pay unsecured creditors of the bankruptcy estate. The shipper is in no worse position than the other general unsecured creditors of the bankruptcy estate.

A bankruptcy or insolvency exception to the filed rate doctrine creates the very discrimination prohibited by the Interstate Commerce Act. Shippers who may defer payment to bankrupt or insolvent carriers pending referral to the ICC on the issue of rate reasonableness will gain a preference over shippers who must pay the legal rates.

ARGUMENT

I. Construction of a Bankruptcy or Insolvency Exception to the Filed Rate Doctrine is Unlawful.

The Petitioners, the Major Shipper Interests, and *Amici Curiae* United States and the Interstate Commerce Commission (hereinafter referred to collectively as the "ICC") in their respective briefs attempt to carve out a bankruptcy or insolvency exception to the filed rate doctrine. The posture of the Petitioners is reflected in their summary of argument at page 7 of their brief as follows:

> If they must pay the disputed amounts first, their "right" is meaningless as they will never get their money back owing to Carolina's bankruptcy. Respondents are bankrupt. If Petitioners win before the ICC, their

> standing is that of mere unsecured creditors.

The posture of the Major Shipper Interests illustrated at page 18 of their brief is stated:

> Nor must the Court decide here whether courts should stay all undercharge actions and refer the question of reasonableness to the ICC, or whether they should require shippers to pay the filed rates and then seek recovery of the difference in separate, sequential actions before the ICC when that procedure will not clearly prejudice either of the parties.

The ICC at page 10-11 of its brief states:

> To interpret the filed rate doctrine to erect a per se barrier to referral would defeat the goals of the Act when the carrier is enmeshed in bankruptcy proceedings. The defunct carrier suffers no prejudice from a stay of the collection action and referral to the ICC. On the other hand, without a prior referral, the shipper would lack an adequate remedy for a claim of unreasonableness, because a subsequent reparations proceeding against a bankrupt carrier offers no realistic promise of relief.

Petitioners' request for relief from immediate payment of the freight charges of Respondent (hereinafter referred to as "the Carrier") pending referral to the ICC is falsely premised on the notion that they will be prejudiced by an inability to obtain payment of any reparations awarded because of the Carrier's bankruptcy.

If the Petitioners comply with their legal duty to pay the legal rate but subsequently obtain a judgment of reparations, creating general unsecured claims against the Carrier's estate, they will become entitled to a pro rata share of the assets available to pay the unsecured creditors. This is in complete accord with the principle of equality of distribution fundamental to bankruptcy administration. See *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941). They cannot therefore claim their legal rights have been prejudiced as against either the Carrier's bankruptcy estate or its general unsecured creditors.

Prior to shipment, the shipper's remedy for rate unreasonableness is a determination by the ICC pursuant to 49 U.S.C. § 11701, that the effective legal rate is unreasonable and a prescription of a reasonable rate for the future. 49 U.S.C. § 11701(a) states, in part:

> The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier, broker, or freight forwarder is violating this subtitle, the Commission shall take appropriate

> action to compel compliance with this subtitle.

After payment of the legal rate, the shipper has another, but mutually exclusive, remedy for unreasonable rates in the past.

After shipment, the shipper's only remedy for the imposition of unreasonable freight rates in the past is contained in 49 U.S.C. § 11705(b)(3), which provides:

> The common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of Chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

The reasonableness requirement for rates is at 49 U.S.C. § 10701(a) which provides, in part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable.

In actions for "reparations", shippers individually seek, as of right, damages measured by the exact difference between the charges paid and the just and reasonable rates. *United States v. Associated Transport, Inc.*, 505 F.2d 366, 369 (D.C. Cir. 1974). Thus, an unlawfully charged shipper may recover to the extent the ICC finds the charges to have been unreasonable. After actual shipment but before payment of the legal transportation charges there is no remedy available for unreasonable rates. Rather, there is an absolute duty on the part of the shipper to pay the legal rate.

The procedure sought by the Petitioners and supporting *Amici* would permit non-payment of the legal rate pending a determination by the ICC of rate reasonableness. In other words, unreasonableness of rates would constitute an affirmative defense. This is equivalent to the procedure set up by the ICC prior to 1959 whereby shippers such as Petitioner could petition the ICC for an order waiving undercharges. See *Bell Potato Chip Co. v. Aberdeen Truckline*, 43 MCC 337 (1944). This procedure was challenged in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) and it was declared unauthorized and invalid.

In *T.I.M.E.*, several motor common carriers sued the United States to collect freight charges. The government defended on the grounds that the rates upon which the carriers relied were unjust and unreasonable. The Court held that the Interstate Commerce Act did not "give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates or to enable them to

assert 'unreasonable' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

A portion of the analysis of the Court in *T.I.M.E.* is pertinent to the analysis of the change in the law since that time. The Court described the status of the law in 1959 as follows:

> The very provisions of Part I and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act. Thus, where § 8 of Part I (fn.7) provides that any common carrier subject to the provisions of this chapter [who] shall do ... any act ... in this chapter ... declared to be unlawful ... shall be liable to the person or persons injured thereby for the full amount of the damages sustained ... Part II has no comparable provision. Again whereas § 9 of Part I (fn.8) gives an injured shipper the right to sue in the ICC or in the Federal District Court, Part II contains no comparable provision. In addition, §§ 13(1) and 16 of Part 1 (fn.9) give a shipper claiming reparation the right to proceed in the Commission and to enforce his

> reparation award in the courts, and Part II contains no comparable provisions.

359 U.S. at 470-471 (footnotes omitted). The Court explained that previous attempts to get Congress to establish the Part I provisions upon implementing the right of reparations against rail carriers in Part II as to motor carriers were not adopted. *Id.* at 471. The Court held that no common law right to seek damages in the courts survived the enactment of the Motor Carrier Act. *Id.* at 472.

Then, as now, the general requirement of 49 U.S.C. § 10701(a) imposed upon common carriers a duty to maintain reasonable rates, but provides no remedy for past violations of that duty and hence, it provides shippers no defense for a violation of that duty. Following the *T.I.M.E.* decision invalidating the ICC reparations procedure Congress enacted the reparation provision now contained in 49 U.S.C. § 11705(b)(3), authorizing reparations actions to recover damages caused by payment of unreasonable rates in the past. Pub. L. 89-170, 79 Stat. 651 (1965). A remedy for past violations was established.

In *T.I.M.E.*, the Court rejected the argument of the government that the MC Act preserved a pre-existing common law right to a reasonable rate, a determination of which the government argued was a matter referable to the ICC. Citing *Montana - Dakota Utilities v. Northwestern Public Service Co.*, 341 U.S. 246, 255 (1951), the Court rejected the government's rate reasonableness defense as involving issues which courts have no authority to

adjudicate and can only refer to a body which also would have no independent jurisdiction to decide. 459 at 474.

Petitioners and supporting *Amici* are asking this Court to hold that a district court in a civil action, other than a shipper action for reparations, may refer to the ICC the issue of rate reasonableness for a preliminary determination whenever the issue is raised as a defense to payment of a motor carrier rate, even though district courts have no authority to adjudicate the reasonableness of a motor carrier's rates absent a shipper action for reparations. Petitioners and supporting *Amici* urge the Court to make such a holding, not pursuant to the statute under which the ICC has jurisdiction to decide damages resulting from payment of the legal rate, but rather under the statute which gives the ICC no jurisdiction to decide damages. The Petitioners and supporting *Amici* urge this Court to give the ICC authority to nullify legal rates legally owing, but not paid. This is the same remedy denied by the Court in *T.I.M.E.*

The Major Shipper Interests argue further that the legal rates may be avoided in the bankruptcy context by asserting setoff. The Petitioner's in this case cannot successfully assert, however, a right of setoff on the basis of an allegedly unreasonable rate. 11 U.S.C. § 553 provides in part:

> Except as otherwise provided in this section and in §§ 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor

> to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, ...

(Emphasis supplied).

The Petitioners have no right of setoff subject to 11 U.S.C. § 553 because the Carrier does not owe a debt to the Petitioners. Under the Bankruptcy Code, "debt" is defined as "liability on a claim". 11 U.S.C. § 101(12). "Claim" is defined under the Bankruptcy Code as a --

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. § 101(5). In this case, Petitioners have asserted no right to payment. Nor are Petitioners capable of

asserting such right when they have failed to comply with their statutory duty to pay the legal freight charges. Without payment of the legal rate, neither a claim for damages or restoration of amounts paid, as required by the reparations statute, is possible. The Major Shipper Interests confuse a "claim" with a "defense". The latter is what Petitioners really assert.

The Petitioners and supporting *Amici* argue that a bankruptcy or insolvency exception should exist to the filed rate doctrine because their reparations remedy, if any, might be meaningless. A bankruptcy or insolvency exception to the filed rate doctrine, however, creates the very discrimination prohibited by the Interstate Commerce Act. Shippers who owe legal freight bill debts to solvent non-bankrupt carriers will still be required to pay the legal rates. The shippers owing legal debts to bankrupt or insolvent motor carriers will gain an advantage over shippers who must pay the legal rates by their right to defer payment of the legal rates on the bare assertion of unreasonableness. Such preferential treatment provides the non-paying shippers a windfall.

The remedy sought here has no counterbalance under the current Interstate Commerce Act. A shipper that has obtained a legal but unreasonably low rate has taken carrier assets to the extent that charges assessed and collected fall short of the cost of performing the service without any remedy available to the carrier. The only counterbalance would be a rule allowing either the bankrupt carrier or shipper to seek damages based upon a determination of the "reasonable" rate.

Not only is there no bankruptcy or insolvency exception to the filed rate doctrine under the Interstate Commerce Act, not all bankruptcy cases are alike. As an example, the disclosure statement filed and approved in AFS's bankruptcy case estimates a maximum possible dividend estimated to be in excess of $1.00. With the distribution scheduled on or about September 11, 1992, AFS will have paid eighty cents on the dollar to unsecured creditors. If shippers seeking referral to the ICC in AFS's turnover actions had paid the legal rates when billed and filed suits for reparations, assuming arguendo rate reasonableness is a legitimate issue in any of the cases, and prevailed, these shippers would be unsecured creditors capable of realizing a substantial dividend, up to 130% pursuant to the Plan, on their claims.

II. The Petitioners and Supporting Amici Misinterpret this Court's Prior Holdings in Asserting that a Finding by the ICC that the Filed Rate is Reasonable, if disputed, is a Prerequisite to its Enforceability.

The proposition advocated by Petitioners and supporting *Amici* that a finding by the Interstate Commerce Commission that a filed rate is reasonable, if disputed, is a prerequisite to its enforceability is contrary to the filed rate doctrine. In support of this proposition, Petitioner and the Major Shipper Interests continue to rely primarily on an excerpt from this Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct.

2759, 2768 at n.10 (1990) to wit, "the filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable," and their interpretation of the Court's decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956).

A. Maislin

The reliance on the quotation from *Maislin* is misplaced. This Court's warning is plainly substantive and not procedural. If upon a properly brought reparations action a rate is found unreasonable, it is not thereafter enforceable. The statement by this Court does not say that procedurally a rate is not enforceable until, upon a claim of unreasonableness, the ICC determines that the legal rate is reasonable. Had this Court meant as the Petitioners assert the *Maislin* decision would be internally inconsistent. Simply stated, it is impossible to have the legal filed rates subject to mandatory collection as stated by this Court in *Maislin*, citing as here pertinent the statement in *Arizona Grocery v. Atchison, Topeka, & Santa Fe R. Co.*, 204 U.S. 370 (1980); to wit, "under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation, and at the same time hold that the legal rate is not collectable unless and until the ICC upon formal complaint asserting unreasonableness determines it to be reasonable. The net result in the *Maislin* decision would be that the filed rate is not collectable even though this Court has at length advised in the decision that the legally

filed rate is the only rate that may be charged and must be collected. This Court's holding in this regard in *Maislin* at page 2768, *supra.*, is as follows:

> We disagree. For a century, this court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. See *supra.* at _____. By refusing to order collection of the filed rate solely because the parties have agreed to a lower rate, the ICC has permitted the very price discrimination the Act by its terms seeks to prevent. See 49 U.S.C. § 10741. [Also citing *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908)].

B. Western Pacific

Reliance on the decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), by Petitioners and the supporting *Amici* is also misplaced. In *Western Pacific*, three railroads sought to collect additional freight charges from the United States for the transportation of aerial bomb casings containing napalm gel. The railroads contended that a tariff covering the shipment of incendiary bombs applied. The United States asserted that a tariff covering the transportation of gasoline in steel drums was applicable. The United States further asserted that, if the tariff for incendiary bombs was applicable, the tariff would

be unreasonable as applied to these shipments and, only as to this issue, the United States asserted that the matter should be referred to the ICC. The Court of Claims found for the railroads.

Neither of the parties questioned the lower court's decision construing the tariffs in finding that the tariff covering incendiary bombs applied to these particular shipments. The Court, however, on its own initiative, reviewed the lower court's decision concerning the applicable tariff and found, on the basis of the factual record, that extrinsic evidence and special expertise were required. Accordingly, this Court directed that the issue be submitted to the ICC. The decision is devoted almost entirely to an analysis of the factual record as to proper classification.

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Id. at 68-69. The Court did not hold that rate reasonableness could be asserted independently as a defense to payment of the filed rate. Nor does *Western Pacific* mandate referral upon the mere assertion that a shipper considers a tariff rate to be unreasonable. On the contrary, the Court in *Western Pacific* stated that:

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In this case, and in the cases brought by AFS, a "reasonableness" issue has been asserted at the whim of the shippers, and as a tactic to avoid or delay paying the freight charges legally due. The tactic should be condemned.

CONCLUSION

In view of the above arguments and authorities, *Amicus Curiae* respectfully requests the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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be not only a violation of the "filed rate doctrine," but also a violation of the crime provisions (illegal rebating) contained in Chapter 119 of Title 49 of the United States Code. AFS did not negotiate with parties and then fail to make publications following those negotiations.

Although AFS's corrected freight bill charges result from errors no different from those existing to prior to the Motor Carrier Act of 1980 (hereinafter referred to as "MC Act"), under which the ICC spawned the "Negotiated Rate Policy", the mere fact of bankruptcy sweeps all cases into the same swirl of rhetoric and delayed or avoided payment of legally applicable tariff charges with cases of negotiated rates with no tariff publication made. Some of the cost of delay is that since AFS's bankruptcy, 83 companies owing freight bill debts to AFS, of which 66 were defendants in lawsuits, have filed in bankruptcy and an additional 104 companies, of which 90 were defendants in lawsuits have closed or gone out of business, in total leaving over $500,000 of unpaid freight bill debts.

STATEMENT

AFS adopts the statement of the case presented in the opinion of the Court of Appeals (Petitioner's Appeal 2a-5a), but offers the following description of the business and regulatory circumstances of the case in the hope that it will assist the Court in its resolution of the issues.

The MC Act was a watershed change in the Interstate Commerce Act. Years of advocacy to Congress about the extent to which the MC Act should be amended

preceded enactment. The action taken by the Congress did not satisfy all advocates including, as of today, the majority of the Interstate Commerce Commission for the majority has presented to Congress its advocacy for reduction and/or total elimination of economic regulation of the trucking industry and Chairman Philbin has publicly announced his disdain for the "filed rate doctrine" and affinity for below cost pricing. See *Brief of Amicus Leonard L. Gumport* at 14 and Appendix A.

The sections of the Interstate Commerce Act providing the regulatory standards for just and reasonable, not unjustly discriminatory, and not wastefully destructive competitive rates, 49 U.S.C. §§ 10701, 10704, 10705, 10761 and supporting sections of Title 49, were left essentially unchanged by the MC Act of 1980. The MC Act of 1980 continued without change the charge to the Commission of the transportation policy, 49 U.S.C. § 10101:

> (1) In regulating those modes - (A) to recognize and preserve the inherent advantage of each mode of transportation; (B) to promote, safe, adequate, economical, and efficient transportation; (C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers; (D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive

> competitive practices; (E) to cooperate with each state and officials on each state on transportation matters; and (F) to encourage fair wages and working conditions in the transportation industry;

The change made by the MC Act occurred in paragraph 2 of the transportation policy which reads:

> (2) regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system;

> and (I) promote intermodal transportation; and

retaining the essential elements of the regulatory structure not changed by the MC Act by which it is possible to establish and maintain reasonable rates which are not unjustly discriminatory. The ICC was to foster the improvement of the motor carrier industry by application of the rigors of the existing principles stated in paragraph 1 of the Transportation Policy with a view toward accomplishing the goals added in paragraph 2.

Even though the basic standards of the Interstate Commerce Act were not changed, AFS experienced pressures until bankruptcy to establish rates for specific shippers far below the bare variable, out-of-pocket cost of performing the service. In order to survive when non-compensatory rates were required either short term or long term to maintain the totality of the system until the problem could be fixed (hopefully), other shippers were charged rates higher than they would otherwise pay to subsidize major shippers. Contrary to the assertions of the *Amici Curiae* in support of the *Petitioners, The National Industrial Transportation League, et al.* (hereinafter referred to as "the Major Shipper Interests"), brief, page 4 and fn.4, AFS discounts were not made to reduce the class rate levels on the basis that those rates were unreasonably high. Some shippers paid the class rates, others obtained small discounts and major shippers obtained, eventually as the decade progressed, huge discounts.

The ICC has watched a massive transfer of motor carrier assets to shippers powerful enough to extract huge discounts. Large shippers of freight have permitted to exert full market power without any limitation. That clout has been enhanced by shortened notice to effect publications of reductions in rates from 30 days' to 1 day's notice. This increase in the velocity of rate changes was not enacted by Congress in the MC Act; the ICC provided for the increased velocity on the urging by shipper interests. See *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarded Rates*, 1 ICC 2d 146 (1984). In this case, the advocates and beneficiaries of such policy seek relief from a situation of their own making.

If the shipping community were now advised it need not pay the legally applicable freight charges until such were reviewed by the ICC, it is impossible to estimate the amount of further losses that would be experienced by the motor carrier industry. Such a holding would emasculate the time of payment requirements of the ICC credit regulations. 49 C.F.R. Part 1320. The relief requested by the major shipping interests would destroy the statutory requirement that the legal charges be timely collected.

SUMMARY OF ARGUMENT

The Petitioners and supporting *Amici* attempt to carve out a bankruptcy exception to the filed rate doctrine. Such an exception is contrary to statute and this Court's

precedent. This Court's precedent has strictly held that under the Interstate Commerce Act the shipper was bound to pay the filed rate. *Arizona Grocery Co. v. Atchison, T. & S. F. R., Co.*, 284 U.S. 370, 384-385 (1932). The filed rate doctrine was most recently upheld in this Court's decision in *Maislin*.

The shipper's only remedy for imposition of unreasonable motor carrier rates in the past is contained in 49 U.S.C. § 11705(b)(3) which provides for damages resulting from the imposition of rates for transportation that the ICC finds unreasonable. Petitioners and *Amici* seek to avoid the requirements of 11705 by asserting that whenever a rate reasonableness defense is raised against a bankrupt carrier the court must refer the issue to the ICC under the doctrine of primary jurisidction for a determination of rate reasonableness. Not only is the mere phrasing of an issue as a matter of rate reasonableness insufficient to invoke the primary jurisdiction of the ICC, see *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), the procedure sought by the Petitioners and supporting *Amici* is equivalent to the procedure declared unauthorized and invalid by the Court in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

Petitioners and *Amici* assert that prejudice to shippers awarded reparations will result from an inability to obtain payment of reparations because of the carrier's bankruptcy. The legal rights of the shipper are not prejudiced, however. Upon payment of the legal rates and any subsequent award of reparations, the shipper will become entitled to a pro rata share of the assets available

to pay unsecured creditors of the bankruptcy estate. The shipper is in no worse position than the other general unsecured creditors of the bankruptcy estate.

A bankruptcy or insolvency exception to the filed rate doctrine creates the very discrimination prohibited by the Interstate Commerce Act. Shippers who may defer payment to bankrupt or insolvent carriers pending referral to the ICC on the issue of rate reasonableness will gain a preference over shippers who must pay the legal rates.

ARGUMENT

I. Construction of a Bankruptcy or Insolvency Exception to the Filed Rate Doctrine is Unlawful.

The Petitioners, the Major Shipper Interests, and *Amici Curiae* United States and the Interstate Commerce Commission (hereinafter referred to collectively as the "ICC") in their respective briefs attempt to carve out a bankruptcy or insolvency exception to the filed rate doctrine. The posture of the Petitioners is reflected in their summary of argument at page 7 of their brief as follows:

> If they must pay the disputed amounts first, their "right" is meaningless as they will never get their money back owing to Carolina's bankruptcy. Respondents are bankrupt. If Petitioners win before the ICC, their

> standing is that of mere unsecured creditors.

The posture of the Major Shipper Interests illustrated at page 18 of their brief is stated:

> Nor must the Court decide here whether courts should stay all undercharge actions and refer the question of reasonableness to the ICC, or whether they should require shippers to pay the filed rates and then seek recovery of the difference in separate, sequential actions before the ICC when that procedure will not clearly prejudice either of the parties.

The ICC at page 10-11 of its brief states:

> To interpret the filed rate doctrine to erect a per se barrier to referral would defeat the goals of the Act when the carrier is enmeshed in bankruptcy proceedings. The defunct carrier suffers no prejudice from a stay of the collection action and referral to the ICC. On the other hand, without a prior referral, the shipper would lack an adequate remedy for a claim of unreasonableness, because a subsequent reparations proceeding against a bankrupt carrier offers no realistic promise of relief.

Petitioners' request for relief from immediate payment of the freight charges of Respondent (hereinafter referred to as "the Carrier") pending referral to the ICC is falsely premised on the notion that they will be prejudiced by an inability to obtain payment of any reparations awarded because of the Carrier's bankruptcy.

If the Petitioners comply with their legal duty to pay the legal rate but subsequently obtain a judgment of reparations, creating general unsecured claims against the Carrier's estate, they will become entitled to a pro rata share of the assets available to pay the unsecured creditors. This is in complete accord with the principle of equality of distribution fundamental to bankruptcy administration. See *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941). They cannot therefore claim their legal rights have been prejudiced as against either the Carrier's bankruptcy estate or its general unsecured creditors.

Prior to shipment, the shipper's remedy for rate unreasonableness is a determination by the ICC pursuant to 49 U.S.C. § 11701, that the effective legal rate is unreasonable and a prescription of a reasonable rate for the future. 49 U.S.C. § 11701(a) states, in part:

> The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier, broker, or freight forwarder is violating this subtitle, the Commission shall take appropriate

> action to compel compliance with this subtitle.

After payment of the legal rate, the shipper has another, but mutually exclusive, remedy for unreasonable rates in the past.

After shipment, the shipper's only remedy for the imposition of unreasonable freight rates in the past is contained in 49 U.S.C. § 11705(b)(3), which provides:

> The common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of Chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

The reasonableness requirement for rates is at 49 U.S.C. § 10701(a) which provides, in part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable.

In actions for "reparations", shippers individually seek, as of right, damages measured by the exact difference between the charges paid and the just and reasonable rates. *United States v. Associated Transport, Inc.*, 505 F.2d 366, 369 (D.C. Cir. 1974). Thus, an unlawfully charged shipper may recover to the extent the ICC finds the charges to have been unreasonable. After actual shipment but before payment of the legal transportation charges there is no remedy available for unreasonable rates. Rather, there is an absolute duty on the part of the shipper to pay the legal rate.

The procedure sought by the Petitioners and supporting *Amici* would permit non-payment of the legal rate pending a determination by the ICC of rate reasonableness. In other words, unreasonableness of rates would constitute an affirmative defense. This is equivalent to the procedure set up by the ICC prior to 1959 whereby shippers such as Petitioner could petition the ICC for an order waiving undercharges. See *Bell Potato Chip Co. v. Aberdeen Truckline*, 43 MCC 337 (1944). This procedure was challenged in *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) and it was declared unauthorized and invalid.

In *T.I.M.E.*, several motor common carriers sued the United States to collect freight charges. The government defended on the grounds that the rates upon which the carriers relied were unjust and unreasonable. The Court held that the Interstate Commerce Act did not "give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates or to enable them to

assert 'unreasonable' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

A portion of the analysis of the Court in *T.I.M.E.* is pertinent to the analysis of the change in the law since that time. The Court described the status of the law in 1959 as follows:

> The very provisions of Part I and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act. Thus, where § 8 of Part I (fn.7) provides that any common carrier subject to the provisions of this chapter [who] shall do ... any act ... in this chapter ... declared to be unlawful ... shall be liable to the person or persons injured thereby for the full amount of the damages sustained ... Part II has no comparable provision. Again whereas § 9 of Part I (fn.8) gives an injured shipper the right to sue in the ICC or in the Federal District Court, Part II contains no comparable provision. In addition, §§ 13(1) and 16 of Part 1 (fn.9) give a shipper claiming reparation the right to proceed in the Commission and to enforce his

> reparation award in the courts, and Part II contains no comparable provisions.

359 U.S. at 470-471 (footnotes omitted). The Court explained that previous attempts to get Congress to establish the Part I provisions upon implementing the right of reparations against rail carriers in Part II as to motor carriers were not adopted. *Id.* at 471. The Court held that no common law right to seek damages in the courts survived the enactment of the Motor Carrier Act. *Id.* at 472.

Then, as now, the general requirement of 49 U.S.C. § 10701(a) imposed upon common carriers a duty to maintain reasonable rates, but provides no remedy for past violations of that duty and hence, it provides shippers no defense for a violation of that duty. Following the *T.I.M.E.* decision invalidating the ICC reparations procedure Congress enacted the reparation provision now contained in 49 U.S.C. § 11705(b)(3), authorizing reparations actions to recover damages caused by payment of unreasonable rates in the past. Pub. L. 89-170, 79 Stat. 651 (1965). A remedy for past violations was established.

In *T.I.M.E.*, the Court rejected the argument of the government that the MC Act preserved a pre-existing common law right to a reasonable rate, a determination of which the government argued was a matter referable to the ICC. Citing *Montana - Dakota Utilities v. Northwestern Public Service Co.*, 341 U.S. 246, 255 (1951), the Court rejected the government's rate reasonableness defense as involving issues which courts have no authority to

adjudicate and can only refer to a body which also would have no independent jurisdiction to decide. 459 at 474.

Petitioners and supporting *Amici* are asking this Court to hold that a district court in a civil action, other than a shipper action for reparations, may refer to the ICC the issue of rate reasonableness for a preliminary determination whenever the issue is raised as a defense to payment of a motor carrier rate, even though district courts have no authority to adjudicate the reasonableness of a motor carrier's rates absent a shipper action for reparations. Petitioners and supporting *Amici* urge the Court to make such a holding, not pursuant to the statute under which the ICC has jurisdiction to decide damages resulting from payment of the legal rate, but rather under the statute which gives the ICC no jurisdiction to decide damages. The Petitioners and supporting *Amici* urge this Court to give the ICC authority to nullify legal rates legally owing, but not paid. This is the same remedy denied by the Court in *T.I.M.E.*

The Major Shipper Interests argue further that the legal rates may be avoided in the bankruptcy context by asserting setoff. The Petitioner's in this case cannot successfully assert, however, a right of setoff on the basis of an allegedly unreasonable rate. 11 U.S.C. § 553 provides in part:

> Except as otherwise provided in this section and in §§ 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor

> to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, ...

(Emphasis supplied).

The Petitioners have no right of setoff subject to 11 U.S.C. § 553 because the Carrier does not owe a debt to the Petitioners. Under the Bankruptcy Code, "debt" is defined as "liability on a claim". 11 U.S.C. § 101(12). "Claim" is defined under the Bankruptcy Code as a --

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. § 101(5). In this case, Petitioners have asserted no right to payment. Nor are Petitioners capable of

asserting such right when they have failed to comply with their statutory duty to pay the legal freight charges. Without payment of the legal rate, neither a claim for damages or restoration of amounts paid, as required by the reparations statute, is possible. The Major Shipper Interests confuse a "claim" with a "defense". The latter is what Petitioners really assert.

The Petitioners and supporting *Amici* argue that a bankruptcy or insolvency exception should exist to the filed rate doctrine because their reparations remedy, if any, might be meaningless. A bankruptcy or insolvency exception to the filed rate doctrine, however, creates the very discrimination prohibited by the Interstate Commerce Act. Shippers who owe legal freight bill debts to solvent non-bankrupt carriers will still be required to pay the legal rates. The shippers owing legal debts to bankrupt or insolvent motor carriers will gain an advantage over shippers who must pay the legal rates by their right to defer payment of the legal rates on the bare assertion of unreasonableness. Such preferential treatment provides the non-paying shippers a windfall.

The remedy sought here has no counterbalance under the current Interstate Commerce Act. A shipper that has obtained a legal but unreasonably low rate has taken carrier assets to the extent that charges assessed and collected fall short of the cost of performing the service without any remedy available to the carrier. The only counterbalance would be a rule allowing either the bankrupt carrier or shipper to seek damages based upon a determination of the "reasonable" rate.

Not only is there no bankruptcy or insolvency exception to the filed rate doctrine under the Interstate Commerce Act, not all bankruptcy cases are alike. As an example, the disclosure statement filed and approved in AFS's bankruptcy case estimates a maximum possible dividend estimated to be in excess of $1.00. With the distribution scheduled on or about September 11, 1992, AFS will have paid eighty cents on the dollar to unsecured creditors. If shippers seeking referral to the ICC in AFS's turnover actions had paid the legal rates when billed and filed suits for reparations, assuming arguendo rate reasonableness is a legitimate issue in any of the cases, and prevailed, these shippers would be unsecured creditors capable of realizing a substantial dividend, up to 130% pursuant to the Plan, on their claims.

II. The Petitioners and Supporting Amici Misinterpret this Court's Prior Holdings in Asserting that a Finding by the ICC that the Filed Rate is Reasonable, if disputed, is a Prerequisite to its Enforceability.

The proposition advocated by Petitioners and supporting *Amici* that a finding by the Interstate Commerce Commission that a filed rate is reasonable, if disputed, is a prerequisite to its enforceability is contrary to the filed rate doctrine. In support of this proposition, Petitioner and the Major Shipper Interests continue to rely primarily on an excerpt from this Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct.

2759, 2768 at n.10 (1990) to wit, "the filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable," and their interpretation of the Court's decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956).

A. Maislin

The reliance on the quotation from *Maislin* is misplaced. This Court's warning is plainly substantive and not procedural. If upon a properly brought reparations action a rate is found unreasonable, it is not thereafter enforceable. The statement by this Court does not say that procedurally a rate is not enforceable until, upon a claim of unreasonableness, the ICC determines that the legal rate is reasonable. Had this Court meant as the Petitioners assert the *Maislin* decision would be internally inconsistent. Simply stated, it is impossible to have the legal filed rates subject to mandatory collection as stated by this Court in *Maislin*, citing as here pertinent the statement in *Arizona Grocery v. Atchison, Topeka, & Santa Fe R. Co.*, 204 U.S. 370 (1980); to wit, "under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation, and at the same time hold that the legal rate is not collectable unless and until the ICC upon formal complaint asserting unreasonableness determines it to be reasonable. The net result in the *Maislin* decision would be that the filed rate is not collectable even though this Court has at length advised in the decision that the legally

filed rate is the only rate that may be charged and must be collected. This Court's holding in this regard in *Maislin* at page 2768, *supra*., is as follows:

> We disagree. For a century, this court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. See *supra*. at _____. By refusing to order collection of the filed rate solely because the parties have agreed to a lower rate, the ICC has permitted the very price discrimination the Act by its terms seeks to prevent. See 49 U.S.C. § 10741. [Also citing *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908)].

B. Western Pacific

Reliance on the decision in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), by Petitioners and the supporting *Amici* is also misplaced. In *Western Pacific*, three railroads sought to collect additional freight charges from the United States for the transportation of aerial bomb casings containing napalm gel. The railroads contended that a tariff covering the shipment of incendiary bombs applied. The United States asserted that a tariff covering the transportation of gasoline in steel drums was applicable. The United States further asserted that, if the tariff for incendiary bombs was applicable, the tariff would

be unreasonable as applied to these shipments and, only as to this issue, the United States asserted that the matter should be referred to the ICC. The Court of Claims found for the railroads.

Neither of the parties questioned the lower court's decision construing the tariffs in finding that the tariff covering incendiary bombs applied to these particular shipments. The Court, however, on its own initiative, reviewed the lower court's decision concerning the applicable tariff and found, on the basis of the factual record, that extrinsic evidence and special expertise were required. Accordingly, this Court directed that the issue be submitted to the ICC. The decision is devoted almost entirely to an analysis of the factual record as to proper classification.

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